87-1152 No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

PUBLIC UTILITIES COMMISSION OF THE STATE OF HAWAII; ALBERT TOM, *Chairman;* SUNAO KIDO, *Commissioner; and* RUSSEL S. NAGATA, *Director of the Department of Commerce and Consumer Affairs, State of Hawaii, and Consumer Advocate,*

Petitioners,

v.

HAWAIIAN TELEPHONE COMPANY, *a Hawaii Corporation,*

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether, despite the Johnson Act, the "express jurisdictional limitations" embodied in 47 U.S.C. § 152(b), and contrary authority, the court of appeals, in a private action under 47 U.S.C. § 401(b) ostensibly brought to obtain obedience to FCC rules relating to separation of revenues and expenses, properly affirmed a federal injunction nullifying wholly intrastate telephone rate orders issued by a duly constituted state rate-making agency, whose decisions were supported by, among other justifications, company statements warranting that higher rates were not needed?

2. Whether such relief ought to be have been barred by the jurisdictional ouster implicit in 28 U.S.C. § 1257, by the Full Faith and Credit Statute, 28 U.S.C. § 1738, or by the policies underlying Article IV, § 1 of the Constitution, as construed by this Court, by reason of

(a) a prior final decision by the highest court of the state holding that, *e.g.*, imposition of rate reductions of the kind attacked below "neither varied a formula, method, or procedure decreed by the federal agency nor tampered with interstate rates in any way";

(b) findings in the state ratemaking proceedings at issue below that, *e.g.*, there was "no evidence" that facts had changed from those in the foregoing state court appeals; or

(c) an order by the highest court of the state granting respondent's voluntary motion to dismiss its appeal from the state agency decision attacked in the courts below?

3. Whether, if the above preclusion doctrines did not bar federal relief, relief was nevertheless improper under:

(a) the principles of equity, comity, and federalism reflected in the abstention doctrines, and which the lower courts were bound to apply if litigation of the

federal issues raised below was not barred in state court and administrative proceedings, fully ongoing when the federal complaint was filed; or

(b) precepts of ripeness that bar federal courts from intervening in administrative processes, that, as here, could have provided relief in new commision dockets?

4. Whether, even if some relief was warranted, the court of appeals exceeded or abused its Article III remedial powers by affirmatively ordering rate increases exceeding $10 million per year instead of enjoining only the state agency's claimed improper rate methodology and remanding for a new decision?*

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* Petitioners include the Public Utilities Commission, State of Hawaii, a regulatory agency created by Haw. Rev. Stat. § 269-2 (1985), Chairman Albert Tom, Commissioner Sunao Kido, and Russel S. Nagata, Director of the Department of Commerce and Consumer Affairs of the State of Hawaii, and Consumer Advocate pursuant to *id.* § 269-51, defendants in the district court and appellants in the court below, and their successors. Director Nagata and Chairman Tom have been succeeded by Robert A. Alm, and Hideto Kono, and Chairman Tom has assumed the duties formerly discharged by Commissioner Kido until his death in office. Director Alm, Chairman Kono, and Commissioner Tom acting in their official capacity all concur in and authorize this petition to be filed on their behalf. *See Karcher v. May*, 56 U.S.L.W. 4022, 4024-25 (U.S. Dec. 1, 1987). Commissioner Clyde S. DuPont, who dissented from the commission decisions here, was named as a defendant but did not join in the appeal below, and is not a petitioner. Respondent Hawaiian Telephone Company ("HawTel"), provides intrastate and interstate telephone service in Hawaii and is regulated under Haw. Rev. Stat. § 269-1. According to its brief filed in the court of appeals on November 29, 1985, HawTel is a wholly-owned subsidiary of GTE Corporation, whose stock is traded on various stock exchanges.

Although the United States is not a party, and the demands of 28 U.S.C. § 2403(a) are not clearly implicated by this petition, the Solicitor General is being served so that the United States may have an opportunity to present its views.

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PUBLIC UTILITIES COMMISSION OF THE STATE OF HAWAII; ALBERT TOM, Chairman; SUNAO KIDO, Commissioner; and RUSSEL S. NAGATA, Director of the Department of Commerce and Consumer Affairs, State of Hawaii, and Consumer Advocate,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners Public Utilities Commission of the State of Hawaii; Albert Tom, Chairman; Sunao Kido, Commissioner; and Russel S. Nagata, Director of the Department of Commerce and Consumer Affairs, State of Hawaii, and Consumer Advocate, together with their successors in office, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on September 11, 1987.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 827 F.2d 1264 (9th Cir. 1987) ("*Hawtel II*"), and is reprinted

in Appendix ["App."] A.* The decisions of the United States District Court for the District of Hawaii granting permanent injunctive relief, granting preliminary injunctive relief, and granting the Consumer Advocate's motion for leave to intervene, are unreported and are reprinted in App. B, C, and D.

Other opinions related to the petition are Public Utilities Commission Order No. 8168, granting reconsideration in part and denying reconsideration in part of Public Utilities Commission Decision and Order 8042 ["D&O 8042"], and D&O 8042, which are reprinted in App. E and G, and the decision of the Supreme Court of Hawaii affirming Public Utilities Commission Decision and Order 7412 ["D&O 7412"], *In re Hawaiian Telephone Co.*, which is reported in 67 Haw. 370, 689 P.2d 741 (1984). (*"Hawtel I"*), and D&O 7412, which are reprinted in App. F and H.

The rulemaking decisions of the Federal Communications Commission dated June 29, 1981, FCC Nos. 81-312 and -313, *Jurisdictional Separations; Integration of Rates and Service for the Provision of Communications by Authorized Common Carriers Between the United States Mainland and Hawaii and Alaska*, which are reported in 87 F.C.C.2d 18 (1981), and 46 Fed. Reg. 38516 (July 28, 1981), are reprinted in App. U.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on September 11, 1987. On November 27, 1987, Associate Justice Sandra Day O'Connor, on petitioners' application, ordered that the time for filing

* Because the record necessary to consideration of this petition is voluminous, record material has been reprinted in a separate Appendix. References to the printed record appear within as, *e.g.*, "A ____."

this petition be extended to and including January 9, 1988.[1] This petition was filed within the time allowed. Jurisdiction in this Court is invoked under 28 U.S.C. § 1254(1). Juris-

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[1] Our application was prompted by concerns that a petition for rehearing mailed to the court of appeals on September 25, 1987, the 14th day after judgment, and marked "filed" by the clerk below on September 28, was untimely and thus not tolling the time in which to petition here. *See Bowman v. Loperena*, 311 U.S. 262, 266 (1940). At the time of our application to Justice O'Connor, we also mailed to the court below a Motion to Expedite Consideration of Petition for Rehearing and Suggestion of the Appropriateness of Rehearing En Banc and to Deem Petition Timely Filed. This course, as stated to Justice O'Connor, was intended to "permit the Ninth Circuit added time to grant plenary rehearing and avoid the need for this Court to grant review." App. for Ext. of Time at 5, No. A-424 (U.S. filed Nov. 24, 1987). Regrettably, the court below has yet to act on either the rehearing petition or the motion to expedite.

This Court nevertheless clearly has jurisdiction, *see* 28 U.S.C. § 1254, and the petition below, even if unresolved when this Court acts, should not have any other adverse impact.

First, while conditions must be met by a petition "to review a case pending in a federal court of appeals, before judgment is given in such court," S. Ct. R. 18, here there is a judgment and Rule 18 is inapt. *Cf.* R. Stern, E. Gressman, and S. Shapiro, *Supreme Court Practice* § 6.3 (1986) at 313 (implying that Rule 18 is inapt when Rule 40 petition is filed). *Second*, for the Court to decide whether Rule 18 applies would require expenditure of scare resources on issues on which there is no independent ground for review under Rule 17. *Third*, even if the Court addressed these issues, *cf. R.J. Reynolds Tobacco Co. v. Durham County*, 107 S. Ct. 499, 506 (1986); S. Ct. R. 21.1(a), it would likely conclude that the petition below was untimely filed. *See* Fed. R. App. P. 40(b) (implying Rule 40 petition is not a "brief" to which Rule 25(a) applies). *Fourth*, while we admittedly relied on Ninth Circuit decisions treating petitions such as ours as timely, *e.g. Gaut v. Sunn*, 792 F.2d 874 (9th Cir. June 20, 1986), *pet. mailed*, No. 83-2320 (July 7, 1986), resp. *ordered* (July 23, 1986), *amended*, 810 F.2d 923 (Feb. 20, 1987), the equities here are properly dealt with by an exercise of discretion by the lower court under Fed. R. App. P. 26(a), as requested in our motion to expedite, or by a decision here to grant certiorari, vacate the judgment below, and remand for consideration of issues presented by the petition for rehearing, or by this petition, on which it is appropriate to have the further views of the court of appeals. *Cf. Goodman v. Lukens Steel Co.*, 107 S. Ct. 2617, 2621-22 (1987). The chance that the court below might moot the need for review, or start anew the time in which review might be sought, is thus not different from that in

diction in the United States District Court was alleged to have been conferred by 28 U.S.C. §§ 1331, 1337(a), 1343, 2201 and 2202, and by 47 U.S.C. § 401(b) (1982). The court of appeals sustained the district court's jurisdiction solely on the basis of 47 U.S.C. § 401(b) (1982).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III, section 2, clause 1 of the United States Constitution provides in relevant part that

> The Judicial Power [of the United States] shall extend to . . . Cases . . . [and] to Controversies . . . .

Article IV, section 1 of the United States Constitution provides that

> Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

Article VI, paragraph 2 of the United States Constitution provides in relevant part that

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Con-

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any other case properly before this Court. We therefore urge the Court to treat the judgment of the court of appeals as final for purposes of considering the prudential factors that would warrant granting certiorari at this time.

Should the Court be of a contrary view, *i.e.*, that this petition is premature, the Court should dismiss this petition without prejudice to a new petition, or to an appeal. *See California v. Rooney*, 107 S. Ct. 2852, 2855 n.2 (1987). Such an order would be proper under 28 U.S.C. § 1651 and would bind the court below to consider the petition for rehearing on its merits. *See Quern v. Jordan*, 440 U.S. 332, 347 (1979) (quoting *Sprague v. Ticonic National Bank*, 307 U.S. 161, 168 (1939)).

> stitution or Laws of any State to the Contrary notwithstanding.

Section 1257 of Title 28 of the United States Code provides in relevant part that

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court . . . .

Section 1342 of Title 28 of the United States Code, known commonly as the Johnson Act, provides that

> The district courts shall not enjoin, suspend or restrain the operation of, or compliance with, any order affecting rates chargeable by a public utility and made by a State administrative agency or a rate-making body of a State political subdivision, where:
>
> (1) Jurisdiction is based solely on diversity of citizenship or repugnance of the order to the Federal Constitution; and,
>
> (2) The order does not interfere with interstate commerce; and,
>
> (3) The order has been made after reasonable notice and hearing; and,
>
> (4) A plain speedy and efficient remedy may be had in the courts of such State.

Section 1738 of Title 28 of the United States Code provides in relevant part that

> The records and judicial proceedings of any court of any . . . State . . . [of the United States] . . . shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State . . . from which they are taken.

Section 152(b) of Title 47 of the United States Code provides in relevant part that

> [N]othing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to . . . charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier[.]

Section 401(b) of Title 47 of the United States Code provides

> If any person fails or neglects to obey any order of the Commission other than for the payment of money, while the same is in effect, the Commission or any party injured thereby, or the United States, by its Attorney General, may apply to the appropriate district court of the United States for the enforcement of such order. If, after hearing, that court determines that the order was regularly made and duly served, and that the person is in disobedience of the same, the court shall enforce obedience to such order by a writ of injunction or other proper process, mandatory or otherwise, to restrain such person or the officers, agents, or representatives of such person, from further disobedience of such order, or to enjoin upon it or them obedience to the same.

Other provisions of the Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. § 151 *et. seq.*, are reprinted in App. T. Relevant provisions of Chapter 269, Haw. Rev. Stat., relating to the powers and duties of the Public Utilities Commission, and Chapter 91, Haw. Rev. Stat., the Hawaii Administrative Procedure Act, are reprinted in App. R and S respectively.

STATEMENT OF THE CASE

This case arises out of efforts by the Public Utilities Commission of the State of Hawaii to regulate the intrastate telephone rates of the Hawaiian Telephone Company. Like most local telephone companies, HawTel monopolizes provision of intrastate telephone service. Ac-

cordingly, as elsewhere, HawTel's economic power over intrastate telephone customers is limited by statutorily-authorized rate review by our Public Utilities Commission. Under law, this review is supervised by the Supreme Court of Hawaii on direct appeals authorized by Haw. Rev. Stat. § 269-16(f), and the Administrative Procedure Act, *id.* ch. 91. Federal judicial review of these state court processes is provided by 28 U.S.C. § 1257 (1982).

The central issue in this case is whether, despite this tested system of review—which Congress has carefully reinforced via the Johnson Act[2] and various sections of the Communications Act[3] so as to bar superintendence of state ratemaking functions by the inferior federal courts—it was proper for a federal district court to nullify non-confiscatory state ratemaking orders and grant millions of dollars in relief to redress what it thought was PUC disobedience of FCC-mandated accounting rules, particularly when the district court acted, not only in the face of Congress's express intent to rope off utility ratemaking from such federal control, but also in disregard of settled precepts of comity, equity, and restraint that block federal judicial action.

Indeed, when this federal case began, HawTel had already sought review in state court, and, when federal relief issued, HawTel had forfeited not only its state court appeal, but also any appeal to this Court of past state court rulings that, on facts the PUC had decided were identical to those here, no federal wrong had been committed. In truth, as the state court rulings made plain, all the PUC ever did was hold HawTel to its statements to our Governor, and others, that rates granted by the district court were unnecessary to HawTel's financial well being in "test years"

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[2] 28 U.S.C. § 1342 (1982); *see California v. Grace Brethren Church*, 457 U.S. 393, 409-10 & n.21 (1982); *Rosewell v. LaSalle National Bank*, 450 U.S. 503, 522 n.28 (1981); *Perez v. Ledesma*, 401 U.S. 82, 129 n.18 (1971) (Brennan, J., dissenting).

[3] *Louisiana Public Service Comm'n v. F.C.C.*, 106 S. Ct. 1890, 1899 (1986) (construing 47 U.S.C. § 152(b) (1982)).

to which the PUC decisions pertained. Because, under PUC rulings, the situation might change in future years, HawTel was free to pursue higher rates in future dockets.

Whether, under these circumstances, the Ninth Circuit correctly affirmed the district court's intrusive ratemaking injunction is the issue to be decided here.

A. The Proceedings in PUC Docket 4588 and Related State Judicial Proceedings.

1. On August 14, 1984, the PUC, in Docket No. 4588, entered a Decision and Order ("D&O 8042") reducing HawTel's intrastate rate of return from 11.25 per cent to 10.15 per cent. D&O 8042 at 14, 134, A 104, 109. The adjustment to HawTel's intrastate return was entered in a rate increase docket filed on December 30, 1982, and was based, pursuant to PUC rules, on "test year" 1983, *id.* at 1, 13, A 90, 103.[4] At the time, FCC regulation of interstate telephone rates generally permitted a return on investment in the interstate rate base, properly calculated, of 10.4 percent, although HawTel apparently enjoyed higher interstate returns. *Id.* at 9, A 98.

2. The PUC ultimately imposed its adjustment to HawTel's rate of return "as a result of the State of Hawaii's, and in turn the ratepayers' support of [a] transitional agreement between [HawTel] and AT&T," D&O 8042 at 11, A 101, and HawTel's failure to prove its intrastate revenue demands were not in "violation of . . . understandings . . . between the State and [HawTel]" concerning the agreement. *Id.* at 10, A 100. These "understandings," rooted wholly in state law, flowed from written representations made at the highest levels by HawTel's corporate officers to Hawaii officials, including the Governor, and

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[4] "Test year" methods draw on the rule that "past experience is an indication of the Company's requirements for the future." *Smith v. Illinois Bell Tel. Co.*, 282 U.S. 133, 158 (1930). The converse—that a rate can be nullified as confiscatory absent findings bearing on "value of the property and the revenues and expenses" in the year under review—is not true. *Id.* at 162; *see Minnesota Rate Cases*, 230 U.S. 352, 466 (1913).

our Members of Congress, that major intrastate rate hikes would be averted by their support for a proposed settlement of FCC rulemaking actions related to interstate telephone rates between Hawaii and the mainland. *See In re Hawaiian Telephone Co.*, 67 Haw. 370, 375-76 & nn.4-7, 383-84 & n.13, 689 P.2d 741, 745 & nn. 4-7, 750 & n.13 (1982) ("*HawTel I*"), A 66, 73-74, 84. The FCC proposal, formulated by HawTel and AT&T, charted three changes to interstate rate policies, none of which, absent additional assurances by HawTel, were clearly advantageous to local ratepayers.

a. *First*, the companies would have to January 1, 1985, to "integrate" telephone toll rates for calls between Hawaii and the mainland into the rate structure prevailing in the contiguous States. Beginning in 1972, the FCC had tried to accomplish this goal, which would reduce interstate phone rates, *see In re Establishment of Domestic Communications-Satellite Facilities by Non-Governmental Entities*, 35 F.C.C.2d 844 (1972), but, without a settlement it seemed that the telephone companies would be able to prolong the matter, as the FCC said, for an "indefinite duration." *See* 46 Fed. Reg. 38516, 38519 (July 28, 1981), A 263. The FCC thought integration deferral "an undesirable aspect of the agreements since it is in the public interest that this be achieved at the earliest possible date," *id.*, a view that was shared by Hawaii. D&O 8042 at 14, A 104.

b. *Second*, to facilitate integration, HawTel would be permitted to employ the NARUC-FCC *Separations Manual*, then-codified at 47 C.F.R. Part 67 (1981), to determine HawTel's allocation of interstate revenues, based on the federally-prescribed criteria for assigning plant, expenses, and revenues to interstate operations. The FCC, in rulemaking proceedings, had adopted the manual for the contiguous States pursuant to 47 U.S.C. § 221(c), "which authorizes [the FCC] to determine 'what property of [a] carrier shall be considered as used in interstate' service for ratemaking purposes," *MCI Telecommunications Corp. v. F.C.C.*, 750 F.2d 135, 140 n.24 (D.C. Cir. 1984), and

had determined in 1976 that rate integration "should be accompanied by cost-based settlements based on prescribed jurisdictional separations procedures." *See* 46 Fed. Reg. 38519 n.7, A 262. Prior to the settlement, no specific federally-prescribed formula had been arrived at, and the NARUC-FCC *Manual,* which embodies the "Ozark Plan," in contrast to the separations formula used by the PUC, known as "Hawaiian Plan II," would, when implemented, place upward pressure on HawTel's intrastate revenue needs. *See* D&O 8042 at 16, A 106 (comparing Ozark, Hawaiian Plan II, and other plans). This, too, was understandably undesirable to our ratepayers.

c. *Third,* in addition to paying HawTel the traditional "cost based settlements" dictated by the *Manual,* AT&T would pay HawTel a substantial subsidy known as the "transitional supplement." *See* 46 Fed. Reg. 38518-19 & n.5, A 260. The transitional supplement, to be paid each year during the transition period 1981-1985, and to be calculated as a declining percentage of the actual interstate revenue growth caused by lowering interstate rates, was on the magnitude of $130 million. *See HawTel I,* 67 Haw. at 375, 689 P.2d at 750, A 73. Supposedly, the transition payments were intended to cushion the "shock" to HawTel occasioned by integration into the national plan and its low rates. As the FCC stated in connection with a settlement implemented to bring our sister State of Alaska into the national rate structure, the transitional supplement was basically a "quid pro quo" for wrapping up the integration proceeding. *See* Mem. Op. & Order No. 86-602, *In re Integration of Rates and Services,* FCC Doc. No. 83-1376 (Dec. 31, 1986). The FCC, without elaboration, stated this feature of the proposal was not "egregiously unreasonable." 46 Fed. Reg. 38519, A 263.

3. Because both the first and second features of the proposed agreement ran counter to the interest of Hawaii ratepayers, HawTel saw it in its interests to make representations to public officials in Hawaii that the settlement, particularly the transitional supplement, would lower *intra*state rates. In response to Governor Ariyoshi's

"pointed query" as to " 'precisely how the users of the Company's intrastate services will directly benefit from the operation of the ... Agreement,' " the President of HawTel, Donald M. Kuyper, wrote that the transition payments " 'lessen the need for local rate increases,' " and that, specifically, FCC approval of the agreement would obviate "a local rate case generating approximately \$30-35 million per year or a 25-26% increase in rates to all local customers.' " *HawTel I,* 67 Haw. at 375, 384 n.13, 689 P.2d at 745, 750 n.13, (citation omitted), A 84. Other letters stated the proposal " 'significantly lessens the need to increase local rates to fully allowable levels in order to maintain [an adequate] comparable overall rate of return [for the Company as a whole].' " *Id.* at 375 n.6, 689 P.2d at 745 n.6, A 74. On this basis, the Governor endorsed the agreement before the FCC. *Id.* at 376 n.7, 689 P.2d at 745 n.7, A 74. In approving the plan, the FCC noted this support. 46 Fed. Reg. at 38519, A 261.

4. The rate case to which D&O 8042 pertained was one of a series of HawTel requests for massive intrastate rate hikes following the entry of the federal agreement. When Docket 4588 was filed, the cumulative effect of these rate requests, if granted, would have been to increase intrastate revenues by more than fifty-four percent, more than *twice* the increase HawTel said it would *not* have to file if, as occurred, the transition agreement was approved, D&O 8042 at 5, A 94. Certain customers would be required to endure local telephone rate hikes of one hundred thirty percent. *Id.* at 6, A 95. During these proceedings, based on the evidentiary impact of HawTel's 1980 statements about its revenue needs, as well as the inference that HawTel's highest corporate officers had misled the State, and ought not be believed, the PUC took the 1980 statements into account in its ratesetting decisions.

a. In the first case, Docket 4306, filed on August 25, 1981, where HawTel requested \$47.6 million in new annual intrastate revenues, the PUC found that "a representation was made by [HawTel] that, *in the absence of an agreement,* the local ratepayers would be subjected to rate increases

per year of 30-35 million dollars," and that "[t]he State gave its support to the Agreement and [HawTel] did obtain its agreement but [HawTel] nevertheless filed, after the support and been given and before the FCC decision was issued, for another rate increase requesting $47,600,000." The PUC ruled that HawTel's rates, if granted, would deprive local customers of the "reciprocal benefit for the State's support of the Agreement." D&O 7412 at 25, 27-28 A 133, 135-36 (original emphasis). Though the PUC could have on this finding totally disallowed the rate request, it opted for the solution of downwardly adjusting HawTel's intrastate rate of return by only 1.1 percent, an amount corresponding to revenue increases occasioned by the switchover to the Ozark separations formulas. Based on data pertaining to the designated test year, 1982, HawTel was granted new intrastate revenues of $27.1 million. *Id.* at 113, A 141. HawTel appealed to our supreme court. Haw. Rev. Stat. § 269-16(f).

b. The second case, Docket 4588, was filed before D&O 7412 had issued, and sought new intrastate revenues of $108.4 million less any increment awarded in Docket 4306. D&O 8042 at 1, A 91. Reaffirming its decision to adjust HawTel's intrastate profits based on HawTel's refusal to grant "reciprocal benefits to the ratepayers as a result of the State of Hawaii's, and in turn the ratepayers' support of the transitional agreement between [HawTel] and AT&T," *id.* at 11, A 101, the PUC reimposed a 1.1 percent rate adjustment without calculating precisely the benefits HawTel gained under Ozark. The PUC also rejected HawTel's claim that the unjust enrichment issue had become moot. Following *The Minnesota Rate Cases, supra* n.4, the PUC stated:

> Although HTC claimed that the rates to be approved in this docket will be [acted on] sometime in 1984 and 1985 will be the first full year it purportedly will have an opportunity to earn an authorized return, *HTC provided no evidence on what its results of operations would be for 1984 and 1985.* HTC assumed that the revenues, expenses, expenditures and conditions with

> the exception of the transitional supplement would remain status quo. We also note that HTC makes no distinction between an actual and normalized year used in the ratemaking process. *Further, 1983 is the test year and all revenues, expenses and similar items based upon a representative year are used in setting rates for the future.* We reject HTC's position with respect to the mootness of the benefits resulting from the agreement between HTC and AT&T.

D&O 8042 at 13, A 102-03 (emphasis added). The decision, issued on August 14, 1984, granted $30.84 million in additional revenues. *Id.* at 135, A 111. On August 24, 1984, HawTel moved for reconsideration, and, on September 10, 1984, while the motion was pending, filed a timely appeal to the Supreme Court of Hawaii *sub nom. In re Hawaiian Telephone Co.*, No. 10169 (Haw. filed Sept. 10, 1984), A 206.

5. On September 27, 1984, the Supreme Court of Hawaii affirmed the PUC's January, 1983, rulings in D&O 7412. *HawTel I*, 67 Haw. 370, 689 P.2d 741 (1984), A 66. Rejecting claims that the granted rates were "confiscatory," the court observed that, in light of HawTel's 1980 statements, "it would have been surprising if the Commission had *not* looked askance at [HawTel's] plea for . . . $47,600,000 in additional revenue." *Id.* at 384, 689 P.2d at 750 (emphasis added), A 84. Rejecting as "without merit" HawTel's claim that the PUC had "invaded a federally preempted area," *id.* at 385, 689 P.2d at 751, A 85, the court held that the PUC "neither varied a formula, method, or procedure decreed by the federal agency nor tampered with interstate rates in any way," *id.* at 386, 689 P.2d at 751, A 86. The court concluded it was proper "[u]nder these circumstances" for "the Commission to take account of the federal prologue to the local rate case." *Id.* at 386-87, 689 P.2d at 751-52, A 87-89. HawTel did not seek review in this Court.

6. On November 15, 1984, the PUC granted reconsideration in part and denied reconsideration in part in

Docket 4588. Order No. 8168, A 49. It denied reconsideration of the adjustment to HawTel's rate of return, noting that its August ruling was "based upon the precedent and principle first enunciated in Docket No. 4306," and holding that the Supreme Court of Hawaii's ruling "on the subject of transitional supplement" in *HawTel I* "is dispositive of this issue in this reconsideration proceeding." *Id.* at 4-5, A 53-55. The PUC refused to grant a phased rate increase to compensate for the rate adjustment, but only because, as stated in D&O 8042, HTC had failed to prove its costs for 1984 and 1985. *Id.* at 6, A 55. The PUC corrected technical errors, and affirmed its decision. *Id.* at 7-8, A 56-58. On November 21, 1984, HawTel moved under Haw. R. App. P. 42 to dismiss its state court appeal, A 205. On December 7, 1984, as HawTel admits, the motion was granted. A 213 n.1.

B. The Federal Proceedings Below.

1. Before reconsideration had been denied and while HawTel's state court appeal was fully alive, HawTel filed this action on November 2, 1984, in United States District Court, claiming, as it did in the Supreme Court of Hawaii in *HawTel I*, that the PUC had, in imposing the 1.1 percent rate-of-return adjustment, "contradict[ed] the FCC-ordered Separations Manual, and directly violate[d] the FCC's Report and Order [approving the HawTel-AT&T agreement.]" Complaint ¶ 20, No. 84-1306, A 182. Styled like complaints rejected by this Court in *Chesapeake & Potomac Telephone Co. v. Public Service Comm'n,* 106 S. Ct. 2239 (1986), HawTel sought relief under 47 U.S.C. § 401(b) on the ground that, whatever basis for the rate adjustment in state law, the PUC "interfered with the intent of Congress and the FCC to provide for a uniform, nationwide separations methodology." Complaint ¶ 40, A 185. Overruling defenses of prior adjudication, estoppel, waiver, and adequate state remedies, and over protests that "principles of comity support equitable restraint,"[5]

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[5] *See* Intervenor's Answer ¶ 34, No. 84-1306 (Nov. 21, 1984);

the district court entered permanent injunctions mandating that the PUC "make effective schedules of intrastate rates for HTC sufficient to generate additional revenues of $10,507,000," that is, the revenue necessary to bump HawTel's intrastate rate of return back up by 1.1 percent. Judgment for Permanent Injunction at 8, No. 84-1306 (D. Haw. Mar. 28, 1985), A 177. The court rejected the PUC's rationale and subsidiary findings as to the import of HawTel's statements largely by reweighing those intensely factual findings on matters of wholly local concern. In the court's view, the PUC had no right to act because "presumably Hawaii intrastate ratepayers have received some benefit from [the HawTel-AT&T] agreement." *Id.* ¶ 15, A 176. Agreeing HawTel could obtain relief in "another future proceeding before the PUC," the court entered relief nonetheless, ruling the "remedy provided by 47 U.S.C. § 401(b), if available in other respects, is not defeated by the existence of an adequate state judicial remedy." *Id.* ¶¶ 16, 20, A 176.

2. On appeal from the District Court's final judgment, a divided panel of the United States Court of Appeals for the Ninth Circuit affirmed. Rejecting the analysis of the Court of Appeals for the First Circuit and other authority, the court's opinion, by Judge Canby, held enforcement of nonadjudicatory FCC orders against state public utility commissions was authorized by 47 U.S.C. § 401(b), 827 F.2d at 1268-72, A 9-19. All but conceding HawTel's claim was a disguised substantive federal attack on the rate order, *id.* at 1275 (citing *The Minnesota Rate Cases*, 230 U.S. 352, 435 (1913)), the court held jurisdiction was not ousted by the Johnson Act because HawTel's action was "based expressly on 47 U.S.C. § 401(b)," and the Johnson Act did not apply. *Id.* at 1273, A 19. Applying federal law

Defendants' Answer ¶¶ 26, 27, *id.* (Nov. 23, 1984), A 192, 196; Mem. in Opp. to Pl. Motion for Prelim. Inj. at 51, *id.* (D. Haw. Nov. 29, 1984) (quoting, *e.g.*, *Alabama Public Serv. Comm'n v. Southern Ry. Co.*, 341 U.S. 341 (1951)), A 209. HawTel argued "[t]here is absolutely no basis for abstention." Reply Mem. at 44, No. 84-1306 (D. Haw. Dec. 10, 1984), A 214.

to whether *HawTel I* was binding, the court rejected collateral estoppel on the ground that, although HawTel's attack did not depend on any facts relating to the harm occasioned by the PUC decisions, the material facts had changed because HawTel was suffering more.[6]

3. Turning to the scope of the Communications Act, the court distinguished this Court's ruling in *Louisiana Public Service Comm'n v. FCC*, 106 S. Ct. 1890 (1986), that 47 U.S.C. § 152(b) negates federal "power to regulate, indeed, set, intrastate rates," *id.* at 1900, and that the "express jurisdictional limitations" contained in § 152(b) forbid *any* federal court, absent constitutional injury, to interfere with State orders whose effects are confined to the intrastate rate base, properly calculated, whether such orders reflect "the perceived need to improve the industry's cash flow, spur investment, subsidize one class of customer, or any other policy factor." 106 S. Ct. at 1902. Noting that FCC rules for determining "what portion of an asset is employed to produce or deliver interstate as opposed to intrastate service'" make possible "'distinct spheres of regulation,'" 827 F.2d at 1276 (quoting 106 S. Ct. at 1902), the court reasoned therefrom that intrastate rates are subject to federal invalidation, independent of any Due Process inquiry, if a court finds the rates were set because the agency *thinks* what the FCC is doing with *inter*state rates is wrong. *Id.* at 1276 & n.30, A 27. Recognizing that D&O 8042 would survive this test because PUC adjusted HawTel's return not because of any quarrel with the FCC, but because the PUC believed HawTel was not playing it straight with the Governor, the court rendered the PUC strictly liable because its orders coincided with the effect of using Hawaiian Plan II, *id.* at 1277, A 28.

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[6] The court did not address ripeness and abstention issues implicated by HawTel's ability to obtain identical relief before the PUC by proving up its 1984-85 expenses, as well as the comity questions raised by the court's interference with complex regulatory processes implicating local issues and in which state proceedings were pending at the commencement of the federal case.

Judge Ferguson dissented, arguing that the court's preclusion analysis was wrong, and that the court's view of § 152(b) embodied "the same kind of argument that [this] Court rejected." *Id.* at 1278-81.

REASONS WHY THE WRIT SHOULD BE GRANTED

Judge Ferguson could not have better isolated the defects in the panel's analysis when he wrote that "[t]he majority's opinion misconstrues the Supreme Court's recent decision in *Louisiana Public Service Commission v. FCC*, 106 S. Ct. 1890 (1986), and in so doing pays scant heed to the important federalism concerns that lie at the heart of this case." 827 F.2d at 1278, A 29. While certiorari is warranted to resolve the direct conflict between *HawTel II* and the First Circuit's reasoned opinion that rulemaking orders are not enforceable under 47 U.S.C. § 401(b), *New England Telephone and Telegraph Co. v. PUC*, 742 F.2d 1 (1st Cir. 1984), *cert. denied*, 106 S. Ct. 2902 (1986), the factors counseling review of whether the court below misconstrued the "express jurisdictional limitations" of 47 U.S.C. § 152(b), *Louisiana*, 106 S. Ct. at 1899, could not be clearer. The lower court's treatment of the *Louisiana* issue not only subverts the reasoning of that opinion and preemption doctrine generally, *see* this Court's Rule 17.1(c), but leads to results that make nonsense of the Johnson Act, and generates, preclusion issues aside, a blatant conflict with the decision in *HawTel I* disposing of identical federal claims. *Id.* 17.1(a).

The reasons warranting review are even more compelling given the lower court's failure to observe the precepts that constrain the power of the inferior federal courts to decide novel issues, such as those here, and that "soften the tensions inherent in a system that contemplates parallel judicial processes." *Pennzoil Co. v. Texaco, Inc.*, 107 S. Ct. 1519, 1526 n.9 (1987). Regardless whether the Ninth Circuit misapplied the Communications Act, the opinion below departed from numerous doctrines, from abstention to res judicata, that, properly applied, would have eliminated "commit[ment] of the resources of [the lower] court[s]

to redundant litigation," and prevented "a contravention of those principles of comity which underlie the federal system." 827 F.2d at 1281 (Ferguson, J., dissenting), A 36. This departure merits this Court's review and correction.

I. The Ninth Circuit's Expansive Interpretation of the Communications Act Raises Substantial Questions Meriting this Court's Review.

In affirming an injunction awarding HawTel more than $10 million annually in new intrastate revenues, the Ninth Circuit held that (1) the FCC's rulemaking order was enforceable in a private action against the PUC under 47 U.S.C. § 401(b); and (2) neither 47 U.S.C. § 152(b), *Louisiana Public Service Commission v. FCC,* 106 S. Ct. 1890 (1986), nor the Johnson Act "stand in the way" of such injunctive relief. *HawTel II,* 827 F.2d at 1268-73, 1276, A 9-19, 25-27. This analysis is wrong on both fronts.

A. The Ninth Circuit's Extension of 47 U.S.C. § 401(b) is in Direct Conflict with the First Circuit and Warrants Review.

As the First Circuit held in *New England Telephone & Telegraph Co. v. PUC,* 742 F.2d 1 (1st Cir. 1984), *cert. denied,* 106 S. Ct. 2902 (1986), non-adjudicatory orders, such as the FCC's rulemaking order mandating application of the separations *Manual* to Hawaii, are not properly "orders" for purposes of 47 U.S.C. § 401(b). The only valid[7] precedent the panel below relied upon to support its contrary view, the unreviewed Seventh Circuit decision in *Illinois Bell Telephone v. Illinois Commerce Comm'n,* 740 F.2d 566 (7th Cir. 1984), does not address the matter expressly, and relies on the district court opinion which the First Circuit reversed in *New England Telephone. See* 740 F.2d at 571. By contrast, Judge Breyer's opinion offers at least ten general reasons for reading § 401(b) nar-

[7] As the panel recognized, 827 F.2d at 1271 n.19, decisions that "have been vacated and remanded or reversed on other grounds," *id.*, are "deprive[d] . . . of precedential effect." *County of Los Angeles v. Davis,* 440 U.S. 625, 634 n.6 (1978).

rowly,[8] most of which are ignored and none of which are rebutted in *HawTel II*. Indeed, the Ninth Circuit panel's offer to forum-shopping litigants that prior adverse state court decisions need be of no concern in the federal courts, even if correct as a matter of preclusion law, *but see infra*, proves well the dangers of "fractionated review" predicted by the First Circuit. This and the other conflicts between the First and Ninth Circuit's analysis warrant this Court's review.

B. The Ninth Circuit's Narrowing of 47 U.S.C. § 152(b) and Misconstruction of *Louisiana Public Service Commission v. FCC*, 106 S. Ct. 1890 (1986), Warrants This Court's Review.

To avoid the impact of 47 U.S.C. § 152(b), and *Louisiana Public Service Commission v. FCC*, 106 S. Ct. 1890 (1986), the Ninth Circuit reasoned that (1) "FCC separations orders control the state regulatory bodies, because

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[8] These include: (1) the propriety of using the APA's definition of "rule" and "order" "in determining the proper construction" of the Act, 742 F.2d at 5; (2) the "established principle" that enforcement of the Communication Act is entrusted to administrative control, *id.*; (3) the danger that, given the indeterminacy of rules, courts in private actions will come to conflicting results, *id.*; (4) doubts about the validity of preenforcement review, *id.* at 7; (5) laws, *e.g.*, 47 U.S.C. §§ 201, 204, 205, 209, 214(d), and 416(a), showing "Congress assumed that 'orders' took the form of specific directives to parties," 742 F.2d at 7; (6) "fractionated review" occasioned when litigants carve federal issues out of state court processes, *id.*; (7) differences in functions between § 401(b) and § 402 that warrant distinguishing *CBS v. United States*, 316 U.S. 407 (1942), 742 F.2d at 7-8; (8) insufficiency of the FCC's "obvious" authority "to impose preemptive nation-wide rules" to require a broad reading of § 401(b) given that state courts and declaratory proceedings are available, 742 F.2d at 9; (9) lack of other precedent, *id.* at 10; and (10) of countervailing agency construction, *id.* at 11.

Despite the fact that the Johnson Act was passed within weeks of the Communications Act, the Ninth Circuit held the term "person" encompasses the PUC or its commissioners, *but cf. Quern v. Jordan*, 440 U.S. 332 (1979), in part because § 401(b) is needed lest state commissions "be free to violate FCC orders with impunity," 827 F.2d at 1270, A 12. *But see Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 240 n.2 (1985).

a nationwide telecommunications system with dual intrastate and interstate rates can operate effectively only if one set of separations procedures is employed"; (2) thus States may not set low intrastate rates because they believe allocation of costs to the interstate base is "too low"; and (3) in downwardly adjusting HawTel's rate of return because of HawTel's statements the PUC was thus engaging in a preempted regulatory practice. 827 F.2d at 1275, 1277 & n.30, A 24, 27 & n.30. This logic grossly overstates the role of federal separations formulas and, in so doing, inverts the reasoning of *Louisiana* and yields anomalous results this Court, and, as important, Congress, could not possibly have intended.

The message of *Louisiana Public Service Commission* is simple and clear. Unless "it [is] *not* possible to separate the interstate and intrastate components of the asserted FCC regulation," 106 S. Ct. at 1902 n.4, States are free to act within the sphere set off by § 152(b)—the realm of "charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service." In *Louisiana*, because of the FCC separations formulas, it was possible to separate the interstate and intrastate components of the regulation. As *Louisiana* shows, separations formulas are a means to an end: permitting States to enjoy the freedom to set depreciation schedules over the federally-defined intrastate portion of the rate base. The formulas are not ends in themselves. *If* States wish to regulate depreciation, they must follow the federal separations formula so they know which portion of, for example, a phone booth is theirs to govern.

By contrast, these constraints are absent here, where a State simply sets an overall rate of return on the federally-prescribed intrastate rate base, and lets the company impose charges to generate revenues to yield that return. If a rate-making body for some reason prefers the rate of return that is generated by a separations formula *other* than that prescribed by the FCC, it is, and should be the State's prerogative to set that rate. The State is doing nothing to negate federal interests, except insofar as such

rates are confiscatory, in which case under the Johnson Act federal power is discharged by the state courts subject to review here. In this case, therefore, the Johnson Act and § 152(b), taken together, simply leave no room for intervention by the inferior federal courts.

The panel turns this balance upside down. Whereas under *Louisiana* States are free, subject to the Due Process Clause, to set the rate of return on the intrastate rate base on the basis of "the perceived need to improve the industry's cash flow, spur investment, subsidize one class of customer, or *any other policy factor*," 106 S. Ct. at 1902 (emphasis added), under *HawTel II* state commissions may be enjoined if it can be shown they are thinking rates for the interstate base are generating too much revenue. *HawTel II*, 827 F.2d at 1277 n.30, A 27. Likewise, whereas under the Johnson Act States are intended to be spared from federal injunctions upon claims that rates are confiscatory, under *HawTel II* utilities need not even bother with the Due Process Clause's rigorous standards.[9] Under *HawTel II*, if a State is allegedly misapportioning costs, that claimed wrong can be redressed in United States District Court in an action "based expressly on 47 U.S.C. 401(b) and FCC Order 81-312." 827 F.2d at 1273. Indeed, taken seriously, under the panel decision if a State wished to set a rate of return *higher* than that yielded by the FCC formulas, that too could be blocked by a proper plaintiff under 47 U.S.C. § 401(b).

This is not, and could not be the law. Within the sphere reserved by 47 U.S.C. § 152(b), "regulation of maximum rates or prices 'may, consistently with the Constitution, limit stringently the return recovered on investment,' " *FCC v. Florida Power Corp.*, 107 S. Ct. 1107, 1113 (1987),

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[9] It is dubious whether Congress, through the Communications Act intended that the FCC separations rules be binding in state court adjudication under the Due Process Clause. As this Court held in *Smith v. Illinois Bell Telephone Co.*, 282 U.S. 133 (1930), as a constitutional matter "only reasonable measures" need be used to apportion the rate bases. *Id.* at 150; *MCI Telecom. Corp. v. FCC*, 750 F.2d 135, 141 (D.C. Cir. 1984).

and, under 28 U.S.C. § 1342, claims under these standards are to be raised in state court. *See California v. Grace Brethren Church*, 457 U.S. 393, 409-10 & n.21 (1982). Given the "express jurisdictional limitations" imposed by § 152(b), no FCC separations formula may constrain State discretion in this area. The panel's "narrowing construction [of § 152(b)] [thus] does not constitute avoidance of a constitutional difficulty, [bu]t merely frustrates permissible applications of a statute." *United States v. Riverside Bayview Homes*, 474 U.S. 121, 128 (1985).

Indeed, given the overwhelming state law basis for downwardly adjusting HawTel's rate of return,[10] the judgment below is without precedent. As the Supreme Court of Hawaii held in *HawTel I*, in 1983 "it would have been surprising if the PUC had not looked askance at a plea for approval of intrastate rate schedules calculated to produce $47,600,000 in additional revenue." 67 Haw. 384, 689 P.2d 745, A 84. Given HawTel's total rate demands, which exceeded $100 million by August, 1984, that statement was doubly applicable to D&O 8042. The prerogative to address HawTel's conduct fully answered any preemption claim challenging the coincidence of the 1.1 percent adjustment with the effects of Hawaiian Plan II, even if, contrary to *Louisiana*, intent in acting within the sphere created by the "sweeping" language of § 152(b), is somehow relevant. *Cf. Mt. Healthy Board of Educ. v. Doyle*, 429 U.S. 274, 287 (1977).

In short, the panel had no good answer to Judge Ferguson's observation that "[t]he argument that HawTel made, and the district court accepted, that the Hawaii PUC's actions constituted an evasion of the federal separations procedures, is essentially the same kind of ar-

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[10] *See University of Hawaii Professional Assembly v. University of Hawaii*, 66 Haw. 214, 221, 659 P.2d 720, 725-26 (1983); Haw. Rev. Stat. §710-1062 (1985). This Court's accommodation of such traditional local concerns as that corporate officials subject to regulation be scrupulously forthright in their dealings with government officials is demonstrated in numerous decisions, *e.g.*, *Kelley v. Robinson*, 107 S. Ct. 353 (1986).

gument that the Court rejected in *Louisiana*." 827 F.2d at 1279, A 33. Although *Louisiana* "is not strictly controlling, in the sense that no holding can be broader than the facts before the court," *United States v. Stanley*, 107 S. Ct. 3054, 3062 (1987), there is no basis for so ignoring the "reasoning" of this Court's decisions. *Id.* at 3063. Accordingly, and because the Ninth Circuit's decision also creates a conflict with the Supreme Court of Hawaii's decision in *HawTel I* which merits review, the Court should grant the writ and summarily reverse or grant plenary review.

II. The Ninth Circuit's Decision to Reach the Merits Contravened Settled Rules Precluding Redundant Litigation of Federal Questions.

The panel's decision to enter the business of overseeing Hawaii's utility ratemaking processes not only misconstrued the Communications Act and the policies of the Johnson Act. As Judge Ferguson protested, had the panel properly applied settled preclusion rules it would not have even reached those issues.

As in *Parsons Steel, Inc. v. First Alabama Bank*, 475 U.S. 518 (1986), the Ninth Circuit "gave unwarrantedly short shrift to the important values of federalism embodied in the Full Faith and Credit Act." *Id.* at 523. That statute, 28 U.S.C. § 1738, " 'does not allow federal courts to employ their own rules of res judicata in determining the effect of state judgments. Rather, it goes beyond the common law and commands a federal court to accept the rules chosen by the State from which the judgment is taken.' " *Id.* (quoting *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 481-82 (1982)). The panel below completely overlooked this mandate when, applying federal preclusion concepts drawn from *Commissioner v. Sunnen*, 333 U.S. 591 (1948), it interpreted *HawTel I*, and inexplicably ignored entirely HawTel's forfeiture of its appeal from D&O 8042.

Both decisions were likely material to the judgment below. Hawaii courts do recognize exceptions to the normal

rules of preclusion " 'to avoid inequitable administration of the laws.' " *Marsland v. ISKCON*, 66 Haw. 119, 125, 657 P2d 1035, 1039 (citation omitted), *appeal dismissed*, 464 U.S. 805 (1983). But how these standards apply are just as keenly questions of state law as the exceptions' existence. As shown above *supra* n.10, Hawaii's rules of estoppel, which lie at the heart of the PUC's action in D&O 7412 and *HawTel I*, are central to the administration of our laws. If the Ninth Circuit had any doubts that, under *Marsland*, these policies would not have been given full force, it should have entered a *Pullman* abstention order and certified the issue over to the Supreme Court of Hawaii pursuant to Rule 13, Haw. R. App. P. *See Railroad Comm'n v. Pullman*, 312 U.S. 496 (1941). Only last Term this Court found the presence of certification rules critical to whether *Pullman* abstention should be ordered. *See Board of Airport Comm'rs v. Jews for Jesus, Inc.*, 107 S. Ct. 2568, 2572 (1987). The purposes of *Pullman* abstention would have been clearly served by certification, for a ruling favorable to petitioners would have " 'rendered unnecessary or substantially modif[ied] the federal constitutional question.' " *Id.* (quoting *Harmon v. Forssenius*, 380 U.S. 528, 535 (1965)). Consideration of *Pullman* abstention is mandatory. *Ohio Bureau of Employment Services v. Hodory*, 431 U.S. 471, 480 n.11 (1977).

The same procedure was even more forcefully applicable to HawTel's dismissal of its state court appeal from the very ratemaking order at issue. Although HawTel sought to paper over this forfeiture by asserting in both courts below that its appellate Rule 42 dismissal had no effect, it offered no authority for this view, *see* A 213 n.1. The Rule, which is identical to Fed. R. App. P. 42, on its face makes its invocation fatal to any attempt to reopen the issues that could have been litigated on appeal. Unlike Haw. R. Civ. P. 41, the counterpart to Fed. R. Civ. P. 41, Hawaii appellate Rule 42 does not give litigants one free bite.

Even on the panel view that *Sunnen* provided the guidance needed, as Judge Ferguson proved, the majority mis-

applied that case. Under HawTel's federal claim, the degree of harm suffered by reason of misapplication of the FCC separations formulas is irrelevant to preemption: any departure is illegal. That HawTel might suffer more by letting the D&O 8042 rates stand in 1985 was not, as Judge Ferguson pointed out, " 'a subsequent modification of the significant facts.' " 827 F.2d at 1281 (quoting *Sunnen*, 333 U.S. at 599)), A 35. Indeed nowhere does the lower court justify permitting HawTel to argue that facts had changed when the PUC had found, specifically, that HawTel had "no evidence" showing that its revenue picture in 1985 was any different from that in test year 1983. HawTel could not have escaped this conclusion on appeal to the Supreme Court of Hawaii, *see* Haw. Rev. Stat. §§ 91-9(g), 91-14(g)(5), A 236, 239, and, under *University of Tennessee v. Elliott*, 106 S. Ct. 3220 (1986), it was the lower court's duty to "give the agency's factfinding the same preclusive effect to which it would be entitled in the State courts." *Id.* at 3227. Thus, wholly apart from the limits implicit in 28 U.S.C. § 1257, *see District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983), which blocked the district court jurisdictionally from reopening the broad preemption issue that was "inextricably intertwined" with the judgment in *HawTel I*, as well as the issues HawTel clearly could have, but did not pursue in its forfeited second appeal, *see* 460 U.S. at 483-84 & n.16, the principles of comity completely foreclosed the Ninth Circuit from reaching the Supremacy Clause issues raised below. This clear departure from this Court's precedents merits correction.

III. Even if Litigation was Not Foreclosed, the Ninth Circuit's Refusal to Abstain Was Plain and Obvious Error.

Even if the panel had correctly concluded that litigation in the state court was not barred and that the *Feldman* doctrine did not apply, it was still the lower court's duty to order this case dismissed. When a federal court "conclude[s] that [a] state-court judgment is not entitled to preclusive effect under [state] law," it is then bound "to decide the propriety of a federal-court injunction under the

general principles of equity, comity, and federalism[.]" *Parsons Steel,* 474 U.S. at 526 (quoting *Mitchum v. Foster,* 407 U.S. 225, 243 (1972)); *Hickey v. Duffy,* 827 F.2d 234, 238 (7th Cir. 1987).

Those principles were emasculated by the lower courts' decisions to reach the merits. Under the familiar three-part test set forth in *Middlesex Ethics Comm. v. Garden State Bar Ass'n,* 457 U.S. 423 (1982), this was an instance in which the principles of *Younger v. Harris,* 401 U.S. 37 (1971), to which *Mitchum* refers, were fully in play. Not only was a state judicial proceeding—HawTel's appeal from D&O 8042—fully ongoing, that appeal, as HawTel conceded, *see* 827 F.2d at 1273, A 19, offered a full opportunity to raise federal questions in state court. *Cf. Monaghan v. Deakins,* 798 F.2d 632 (3rd Circ. 1986), *cert. granted,* 107 S. Ct. 946 (1987). Nor could there be debate that the "important state interests" prong, *Middlesex,* 457 U.S. at 432, was met. This Court, as early as *Huffman v. Pursue, Ltd.,* 420 U.S. 592 (1975), held that proceedings "in aid of and closely related to criminal statutes," *id.* at 604, such as the false statements law, Haw. Rev. Stat. § 710-1062 (1985), implicate interests sufficient to warrant *Younger* abstention. Here, of course, there might not have been proof beyond a reasonable doubt that HawTel's statements were intentionally misleading, but it was appropriate, and sufficient for *Younger* purposes, for the State to raise its concerns in the PUC proceedings in order to protect the public from overreaching by one of its largest monopolies. *See Trainor v. Hernandez,* 431 U.S. 434, 444 (1977). Indeed, if these interests were not enough, the interest in prosecuting our prior judgment in *HawTel I* in the second state court appeal was no different from that found last Term to be sufficient in *Pennzoil Co. v. Texaco, Inc.,* 107 S. Ct. 1519 (1987). Here, as in *Pennzoil, Younger* abstention is fully warranted by "the importance to the States of enforcing the orders and judgments of their courts." *Id.* at 1527. Indeed, even the concurring Justices in *Pennzoil,* who voiced concerns that Texas' "negligible" and "attenuated" interests in the lien and bond dispute

lacked the "substantive" force present in previous *Younger* cases, should be persuaded that abstention is proper here. *Id.* at 1530 (Brennan, J., joined by Marshall, J.); *id.* at 1534 (Blackmun, J.); *id.* at 1536 n.2 (Stevens, J.). Here the State of Hawaii's interests could not be more "substantive"; they were neither "negligible," nor "attenuated." And, of course, just as HawTel could not "escape *Younger* abstention by failing to assert its state remedies in a timely manner,' *id.* at 1529 n.16, it could not, by abandoning its state court appeal altogether, avoid the "outright dismissal," *Gibson v. Berryhill*, 411 U.S. 564, 577 (1973), which *Younger* requires. *Pennzoil*, 107 S. Ct. at 1528.

Abstention was all the more warranted by the *Burford* doctrine, *see Burford v. Sun Oil Co.*, 319 U.S. 315 (1943); *Alabama Public Service Comm'n v. Southern Railway Co.*, 341 U.S. 341, 345 (1951); *Law Enforcement Insurance Co. v. Corcoran*, 807 F.2d 38 (2d Cir. 1986); *New Orleans Public Service v. City of New Orlenas*, 798 F.2d 858, 862 (5th Cir. 1986). *Burford*'s bar on interference with administrative orders emanating from a unified regulatory scheme overseen by the state courts was fully required here, for however the preemption issue is framed, the district court was squarely "asked to intervene in resolving [an] essentially local problem." *Alabama Public Service*, 341 U.S. at 347. That problem was to what degree HawTel was to be believed, and to what extent the PUC was entitled to consider HawTel's requests "disingenuous under the circumstances." 827 F.2d at 1267 n.2. That the district court disagreed with the PUC over what were the PUC "understandings" with HawTel and the court below did not find HawTel's shifting positions worthy of mention are only evidence of the " 'misunderstanding of local law, and needless federal conflict with the state policy' " to which the *Burford* doctrine is targeted. *See Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 122 n.32 (1984) (quoting *Burford*). In refusing to abstain, the court of appeals wrongly ignored the "complex of considerations designed to soften the tensions inherent in a system that

contemplates parallel judicial processes," *Pennzoil*, 107 S. Ct. at 1526 n.9. This plain and obvious failure merits review and reversal by this Court.

IV. The Ninth Circuit's Refusal to Invoke the Doctrine of Administrative Finality also Warrants Review.

Even if preclusion was unwarranted and the abstention doctrines inapt, the lower courts should not have entered the fray for still another reason: HawTel's real claim, at least as conceived and postured by the court of appeals, was not ripe.

The Ninth Circuit asserted that if HawTel had any claim left after *HawTel I*, it was that its rate of return was being lowered during the period after which AT&T would stop paying the transitional supplement. 827 F.2d at 1274. If this was true what the Ninth Circuit failed to appreciate was that HawTel had the opportunity to file before the PUC to correct the perceived problem, but did not timely do so. Rather, HawTel simply argued in Docket 4588, which had been addressing 1983, that its situation would change in 1985, but offered no proof of its 1985 total revenue picture, *see* D&O 8042 at 13, A 103, a prerequisite under Commission rules, *see* D&O 7412 at 2, A 123, and decades of rate decisions. *See, e.g., The Minnesota Rate Cases*, 230 U.S. at 466.

In *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985), this Court, in a Takings context, observed that the requirement of administrative finality precludes federal jurisdiction until "the administrative agency has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular [property] in question." *Id.* at 191. To overcome the finality rule, a litigant must show that it has completed administrative requirements and applied for variances. *Id.* at 188; *see also MacDonald, Sommer & Frates v. Yolo County*, 106 S. Ct. 2561, 2567-68 (1986). Litigants, moreover, may not recover for "normal delays in litigation." *First English Evangelical Lutheran Church v. County of Los Angeles*, 107 S. Ct. 2378, 2389 (1987).

And that claimants have been denied "exceedingly grandiose" relief, *MacDonald,* 106 S. Ct. at 2569 n.9, does not entitle them to plead in federal court for less, because there is no assurance that "less ambitious plans will recieve similarly unfavorable reviews [from the agency]." *Id.*

Much like the lower courts in *Williamson County,* the Ninth Circuit here cavalierly aborted ongoing regulatory processes not only when there was no need to do so, but when there was no power under Article III. HawTel, to be sure, had asked for "grandiose relief" in the form of immediate rate hikes, but the PUC's denials, spirited as they were, could not be taken as indicative of how the Commission would exercise its discretion in future rate dockets. Under this Court's decisions, HawTel's attack on D&O 8042 should have been dismissed as an example of "tilting at windmills," *Quern v. Jordan,* 440 U.S. 332, 338 (1979); *see I.L.W.U. Local 37 v. Boyd,* 347 U.S. 222, 224 (1954). Instead, HawTel's evidentiary failures were rewarded with massive injunctive relief. This conflict between the panel's precipitous intrusion into an ongoing rate process and this Court's ripeness decisions warrants review in this Court.

V. The Ninth Circuit's Remedial Order Violated Article III.

In defining the the federal courts' powers, this Court has held time and again that "the scope of the remedy is determined by the nature and extent of the constitutional violation." *Milliken v. Bradley,* 418 U.S. 717, 744 (1974); *accord, Dayton Board of Education v. Brinkman,* 433 U.S. 406, 420 (1977); *see also City of Los Angeles v. Heller,* 475 U.S. 796, 799 (1986); *Allen v. Wright,* 468 U.S. 737, 751, 759 (1984).

The panel acknowledged this precept in seeking to limit the issue before it by writing reassuringly that it was not about to "preempt state ratemaking," but rather "inconsistent separations adopted, openly or otherwise, by the state for the purposes of establishing the intrastate rate base." *HawTel II,* 827 F.2d at 1275 n.29. But the court's

remedy—a mandatory injunction affirmatively granting new annual revenues of $10 million—was plainly in excess of the "nature and extent of the constitutional violation." Whereas on the panel's understanding of *Louisiana* a simple injunction mandating what it thought were the correct accounting rules would have sufficed, the panel's remedy usurped the PUC's ratesetting power lock, stock, and barrel. This intrusion upon State prerogatives not only flouts the jurisdictional precepts of *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89 (1984), and provides an added compelling ground for granting certiorari, it proves more than ever that the decision below, permitted to stand, would grant the lower federal courts an unchecked commission to override the public utility ratemaking bodies of the States comprising the Ninth Judicial Circuit.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for certiorari and summarily reverse, or grant plenary review. Because several of the decisions of this Court relied upon in this petition were not handed down until after the case was submitted below, under the circumstances of this case if the Court believes that reversal or plenary review is inappropriate, the Court should grant the petition, vacate the judgment below, and remand for further consideration in light of the arguments presented in this petition, or such portions thereof which the Court finds it would be appropriate to have the added views of the court of appeals. To facilitate this Court's disposition of the second question presented, we also respectfully suggest to the Court that it may wish to certify questions of state law to the Supreme Court of Hawaii under Haw. R. App. P. 13 relating to whether, in the courts of the State of Hawaii, the judgment in *HawTel I*, or the order granting HawTel's motion to dismiss its appeal in No. 10169 (Haw. filed Sept. 10, 1984), would bar relief of the sort granted by the district court here.

Respectfully submitted,

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87 - 1152

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

PUBLIC UTILITIES COMMISSION OF THE STATE OF HAWAII; ALBERT TOM, *Chairman;* SUNAO KIDO, *Commissioner; and* RUSSEL S. NAGATA, *Director of the Department of Commerce and Consumer Affairs, State of Hawaii, and Consumer Advocate,*

Petitioners,

v.

HAWAIIAN TELEPHONE COMPANY, *a Hawaii Corporation,*

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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APPENDIX TO THE PETITION FOR WRIT OF CERTIORARI

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EDITOR'S NOTE

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UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

HAWAIIAN TELEPHONE COMPANY, a Hawaii Corporation, *Plaintiff-Appellee,* v. PUBLIC UTILITIES COMMISSION OF STATE OF HAWAII; ALBERT TOM, Chairman; SUNAI KIDO, Commissioner; and CLYDE S. DUPONT, Commissioner, *Defendants,* CONSUMER ADVOCATE, the Director of the Department of Commerce and Consumer Affairs, State of Hawaii, *Intervenor-Defendant-Appellant.*	Nos. 85-1907/1908 D.C. No. C-84-1306-SPK OPINION

Argued and Submitted
March 28, 1986—Honolulu, Hawaii
Submission Deferred April 29, 1986
Resubmitted October 28, 1986

Filed September 11, 1987

Before: Warren J. Ferguson, William C. Canby, Jr. and Cynthia Holcomb Hall, Circuit Judges.

Opinion by Judge Canby; Dissent by Judge Ferguson

Appeal from the United States District Court
for the District of Hawaii
Stephen P. King, District Judge, Presiding

SUMMARY

Communications

The Hawaiian Telephone Co. (HawTel), which provides phone service for the state, is regulated by the defendant Hawaii Public Utilities Commission (PUC). The Federal Communications Commission (FCC) sets HawTel's long-distance rates and the PUC sets intrastate rates. Physical plant used for both services is apportioned between the two kinds of service through separations procedures. Although Hawaii's interstate phone rates had been higher than rates in other states, the FCC determined in 1972 that the rates should be integrated into the mainland domestic rate pattern, and adjustments were made so that they would be comparable. The FCC later decided that integration would be accomplished in part by establishing new procedures for cost apportionment. A special Federal-State Joint Board set up to advise on separations procedures recommended use of the Ozark Plan, instead of the Hawaiian Plan II used by the PUC. The FCC and telephone companies agreed to phase in the new procedures over four years to achieve full implementation by January 1, 1985, with the interstate carrier making transitional supplements to HawTel to reduce the need for increased local rates. This was adopted in FCC Order 81-312. Shortly afterward, HawTel filed for a local rate increase, but the PUC cut the amount requested, in part due to a 1.1% rate-of-return adjustment proposed by the PUC, which represented the differences between using the Ozark Plan and the Hawaiian Plan II. The Hawaii Supreme Court affirmed, but while the appeal was pending HawTel filed for another rate increase. The PUC again granted a smaller increase, using the same 1.1% rate-of-return adjustment, but this time not expressly comparing rates under the two plans. HawTel filed suit in federal district court challenging the decision. Appellants PUC and Consumer Advocate (an intervenor) argued that the court lacked jurisdiction to hear the case, and that the

intrastate rate decision is consistent with Order 81-312, but the court rejected these contentions and issued injunctions.

[1] The PUC itself is a person for purposes of section 401(a) of the Communications Act, and even if the PUC itself does constitute a person subject to an enforcement action, the individual Commissioners clearly are individuals, so the court would not lack subject matter jurisdiction even if the PUC were not a person. [2] In addressing the question of whether FCC Order 81-312 constitutes an order of the commission within the meaning of the Act, there is no authority to support the proposition that the distinction drawn by the Administrative Procedures Act (APA) between a rule or an order should be applied to the Communications Act, which was modeled after the Interstate Commerce Act. [3] Nor does the language of other sections of the Communications Act show that Congress did not intend to limit section 401(b) exclusively to adjudicatory orders as the APA defines them. [4] This order was appropriately interpreted as an order for enforcement by injunction. [5] Finally, the challenge to jurisdiction based on the requirement that the order be regularly made by the FCC refers only to procedural regularity. The district court had subject matter jurisdiction, [6] which is not barred by the Johnson Act. [7] The appellants also assert that HawTel had earlier argued to the Hawaii Supreme Court that the PUC misapplied FCC Order 81-312, and that this issue is now foreclosed. [8] But there were sufficient differences between the two cases to militate against application of collateral estoppel.

[9] Appellant Consumer Advocate contends that FCC Order 81-312 did not preempt state regulation of separations procedures and that the use of state-developed procedures was proper intrastate rate-making. [10] The Communications Act empowers the FCC to prescribe uniform separations procedures. A nationwide telecommunications system with dual intrastate and interstate rates can operate effectively only if one set of separations procedures is employed. [11] The

FCC's efforts to integrate Hawaii into the established rate scheme for communications services applicable to the mainland and the need for consistent apportionment between interstate and intrastate operations are sufficient to convince that Order 81-312 preempted any independent separations procedures of the Hawaii PUC. [12] This conclusion is supported by *Louisiana Public Service Commission v. FCC*, 106 S.Ct. 519 (1986), as that decision held that a state's independent depreciation rule for intrastate rate-making could be protected from federal preemption only after a uniform separations formula has been applied. [13] Finally, the district court did not err in finding that the PUC's rate adjustment was an attempt to nullify the FCC's Ozark separation plan. [14] The court properly considered the effect of the PUC's ruling to determine whether it conflicted with federal law, and made no clear error in finding that it did.

Judge Ferguson dissents, arguing that the *Louisiana Public Service Commission* case constitutes a congressional denial of power to the FCC to regulate intrastate rate-making.

COUNSEL

Thomas W. Williams, Jr., Honolulu, Hawaii, for the plaintiff-appellee.

Ronald Shigekane, Honolulu, Hawaii, for the Consumer Advocate appellant.

Harry S.Y. Kim, Honolulu, Hawaii, for the appellants.

OPINION

CANBY, Circuit Judge:

The ultimate issue in this case is whether the Hawaii Public Utilities Commission (PUC) violated an order of the Federal

Communications Commission mandating use of a particular set of "separations" procedures for allocating the respective costs and investments between interstate and intrastate telephone operations. A threshold question is whether the district court had jurisdiction under § 401(b) of the Communications Act to enforce the FCC order. In essence, the district court's permanent injunction required the PUC to obey the FCC order by raising Hawaiian Telephone Company's (HawTel's) intrastate rates by $10,507,000 annually.

Hawaii's PUC and Consumer Advocate, as intervenor, appealed. We deferred submission to await the Supreme Court's recent decision in *Louisiana Public Service Commission v. FCC*, 106 S. Ct. 1890 (1986), and to permit the parties to comment upon it. We now affirm the district court's injunction.

BACKGROUND

HawTel provides interstate, intrastate, and overseas telephone service for residents of Hawaii. The FCC sets HawTel's long-distance rates, and the PUC sets intrastate rates. Because the same physical plant is used for both interstate and intrastate services, some system for apportioning costs and investments is necessary to set fair rates for the respective services. *See generally MCI Telecommunications Corp. v. FCC*, 750 F.2d 135 (D.C. Cir. 1984); McKenna, *Preemption Under the Communications Act*, 37 Fed. Comm. L.J. 1 (1985). This system of apportionment is referred to as "separations procedures."

Until recently, interstate rates for telecommunications to and from Hawaii were considerably higher than interstate rates in the 48 contiguous states. In 1972, the FCC determined that Hawaii's rates should be integrated into the Mainland domestic rate pattern. Interstate rates in Hawaii accordingly were to be adjusted so that they would be roughly comparable to rates in other parts of the United States. *In re*

Establishment of Domestic Communications-Satellite Facilities by Non-Governmental Entities, Second Report & Order (Docket No. 16495), 35 F.C.C.2d 844, 856-57, *aff'd on reconsideration,* 38 F.C.C.2d 665 (1972), *aff'd sub nom. Network Project v. FCC,* 511 F.2d 786 (D.C. Cir. 1975). The FCC later decided that integration would be accomplished in part by establishing new procedures for interstate and intrastate cost apportionment. The FCC, exercising its authority under 47 U.S.C. § 410, established a special Federal-State Joint Board, to advise it on fair separations procedures for Hawaii.The FCC had not previously prescribed any separations procedures for Hawaii, and the PUC had apportioned costs according to its own "Hawaiian Plan II."

In 1981, the Joint Board recommended use of the so-called "Ozark Plan," *see* 47 C.F.R. §§ 67.1-67.701, for separations. *In re Integration of Rates & Services for the Provision of Communications by Authorized Common Carriers between the United States Mainland & Hawaii & Alaska,* Memorandum Opinion & Order (Docket 21263), 87 F.C.C.2d 20, 24 (1981). The Ozark Plan, which was developed through cooperative efforts of the FCC and utility regulators nationwide, had been used in the 48 states for some time. The Joint Board suggested extending the Plan for use in Hawaii without modification. *Id.* The FCC ordered application of the Ozark separations procedures to Hawaii. *Integration of Rates & Services for the Provision of Communications by Authorized Common Carriers between the United States Mainland & Hawaii & Alaska,* Report & Order 81-312 (Docket 21263), 87 F.C.C.2d 18 (1981) [hereafter Order 81-312].[1]

The new procedures were expected to yield significantly lower interstate phone rates, but only at the price of upward pressure on intrastate rates. To avoid a dramatic impact on local rates, the FCC, AT&T, and HawTel agreed to phase in the new procedures over four years, with full implementation

[1] *See infra* note 21.

by January 1, 1985. During the transition period, AT&T was to make certain payments or "transitional supplements" to HawTel, thereby reducing the need for immediate intrastate rate relief.

In August 1981, shortly after the integration plan was adopted in FCC Order 81-312, HawTel filed for a local rate increase of $47.6 million. PUC Docket 4306. This proceeding was a predecessor to the one that is the subject of this appeal. The PUC granted only $27.1 million of the requested increase, in part due to a downward 1.1 percent rate-of-return adjustment proposed by the PUC itself. The "Separation Adjustment" represented the difference between intrastate rates resulting from jurisdictional separations calculated under the Ozark Plan and those calculated under Hawaiian Plan II. *In re Application of Hawaiian Telephone Company*, PUC Decision & Order No. 7412, Docket No. 4306 (Jan. 1983); *see In re Application of Hawaiian Telephone Company*, 67 Haw. 370, 689 P.2d 741, 751-52 (Haw. 1984). The PUC agreed that the Ozark Plan should be used to establish the rate base, and that an 11.46 percent rate of return was appropriate. It also conceded that the transitional payments from AT&T must be treated as interstate revenues. It considered the special downward adjustment proper, however, in light of the State's previous support for the transitional rate-integration agreement between AT&T, HawTel, and the FCC. At HawTel's request, the State had lobbied the FCC for approval of the transition agreement, at least in part because of HawTel's representations that it would need local rate relief of $30-35 million per year if the agreement were not adopted.[2]

[2]It appears that the PUC considered the rate request somewhat disingenuous under the circumstances. In particular, the PUC found that HawTel was already receiving rate relief through the transitional payments from AT&T. The PUC also stated that it ordered the 1.1 percent adjustment because it found that the shift from Hawaiian Plan II to Ozark resulted in a 1.1 percent reduction in the firm's intrastate returns, even though HawTel's overall revenues and expenses basically remained unchanged. The PUC therefore found the rate-of-return adjustment necessary to avoid a windfall for HawTel. PUC Decision & Order No. 7412 at 23-24.

HawTel appealed the PUC's decision in Docket 4306 to the Hawaii Supreme Court, arguing that the order in fact nullified the FCC's 1981 mandate to employ the Ozark Plan. On September 27, 1984, the court upheld the PUC, finding that the PUC had employed appropriate procedures and that it merely had determined the appropriate rate of return on intrastate business, which was within its authority. *Application of Hawaiian Telephone Company*, 67 Haw. ___, 689 P.2d at 751. HawTel declined to seek United States Supreme Court review.

While HawTel's state-court appeal was pending, it filed for another rate increase, with which this appeal is directly concerned. PUC Docket 4588. In Docket 4588, after determining that HawTel would be entitled under the Ozark Plan to some $30 million in new revenues, at a reasonable 11.25 percent rate of return, the PUC made an identical 1.1 percent rate-of-return adjustment. *In re Application of Hawaiian Telephone Company*. Decision & Order No. 8042, Docket No. 4588 (Aug. 1984). It granted HawTel about $20 million in rate relief, $10,507,000 less than its calculations indicated HawTel otherwise should receive. This time, however, the PUC did not expressly compare rates under the Ozark Plan to rates under Hawaiian Plan II, the way that it did to arrive at the 1.1 percent figure in 1981.

HawTel filed suit in federal district court under 47 U.S.C. § 401(b),[3] challenging the PUC's second rate decision in Docket 4588. The downward rate adjustment, HawTel argued, constituted a failure of the PUC to obey FCC Order 81-312. Appellants PUC and Consumer Advocate argued that the district court lacked jurisdiction under § 401(b) and

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[3]Section 401(b) is discussed at length *infra* Part I. HawTel also asserted subject matter jurisdiction in the district court under 28 U.S.C. §§ 1331, 1337(a), 1343, 2201 & 2202. The court sustained jurisdiction under § 401(b) and did not rule on the other grounds. Because we uphold the district court's ruling, we do not consider the other jurisdictional claims.

that the PUC's intrastate rate decision was consistent with FCC Order 81-312. Further, appellants contended that Haw-Tel's action was barred by the Johnson Act, 28 U.S.C. § 1342,[4] and by the doctrine of res judicata. The district court rejected these contentions. Finding that the second 1.1 percent adjustment had the effect of applying Hawaiian Plan II as the basis for separations, the court issued preliminary and permanent injunctions. *Hawaiian Telephone Company v. Public Utilities Commission*, Civ. No. 84-1306, slip op. (D. Haw. Mar. 13, 1985). Both the PUC and the Consumer Advocate appeal.[5]

DISCUSSION

I. JURISDICTION UNDER 47 U.S.C. § 401(b)

Questions of subject matter jurisdiction and statutory interpretation are reviewed in this court *de novo*. *Carpenters Southern California Admin. Corp. v. Majestic Housing*, 743 F.2d 1341, 1343 (9th Cir. 1984); *Southeast Alaska Conservation Council, Inc. v. Watson*, 697 F.2d 1305, 1309 (9th Cir. 1983).

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[4] 28 U.S.C. § 1342 provides:

> The district courts shall not enjoin, suspend or restrain the operation of, or compliance with, any order affecting rates chargeable by a public utility and made by a State administrative agency or a rate-making body of a State political subdivision, where:
>
> (1) Jurisdiction is based solely on diversity of citizenship or repugnance of the order to the Federal Constitution; and,
>
> (2) The order does not interfere with interstate commerce; and,
>
> (3) The order has been made after reasonable notice and hearing; and,
>
> (4) A plain, speedy and efficient remedy may be had in the courts of such State.

[5] The appeals were consolidated by our order of Aug. 20, 1985, and appellants filed a joint brief.

47 U.S.C. § 401(b) states:

> If any person fails or neglects to obey any order of the [FCC] other than for the payment of money, while the same is in effect, the [FCC] or any party injured thereby . . . may apply to the appropriate district court of the United States for the enforcement of such order. If, after hearing, that court determines that the order was regularly made and duly served, and that the person is in disobedience of the same, the court shall enforce obedience to such order by a writ of injunction or other proper process, mandatory or otherwise, to restrain such person or the officers, agents, or representatives of such person, from further disobedience of such order, or to enjoin upon it or them obedience to the same.

The threshold questions in this case are whether a state utility regulatory body is a "person" and whether, as a rulemaking or nonadjudicatory order, FCC Order 81-312 is an "order" "regularly made" within the meaning of Section 401(b).

A. *Whether the PUC is a Person Within the Meaning of the Statute*

The definitional section of the Communications Act, 47 U.S.C. § 153, provides that: "[U]nless the context otherwise requires . . . . "Person" includes an individual, partnership, association, joint-stock company, trust, or corporation." *Id.* § 153(i). The Act defines "state commission" as "the commission, board, or official (by whatever name designated) which under the laws of any State has regulatory jurisdiction with respect to intrastate operations of carriers." *Id.* § 153(t).

In support of their contention that the district court lacked subject matter jurisdiction to grant injunctive relief because the PUC is not a "person" for purposes of § 401(b), appellants principally rely on the Vermont district court's decision in

New England Telephone & Telegraph Company v. Public Service Board of Vermont, 576 F. Supp. 490 (D. Vt. 1983), *vacated as moot*, 794 F.2d 677 (2d Cir. 1984).[6] In that case, the district court held that because the definition of "person" in § 153(i) includes a series of specific categories that do not encompass state utility commissions, the term "person" should not be interpreted to include such commissions. *New England Tel. & Tel.*, 576 F. Supp. at 493-95.

We disagree with appellants' argument and the district court's analysis in *New England Tel. & Tel.* The design of the statute leads us to conclude that the PUC itself is a person for purposes of § 401(b)[7]. Section 153(i) does not specify the *meaning* of "person" in the Communications Act, but instead lists several categories of entities that the term "includes."[8] Thus, the definition of "person" is open-ended and not restricted to the examples enumerated in the statute.[9] Fur-

[6]*New England Tel. & Tel.* is listed as "REVERSED AND REMANDED" at 794 F.2d 677. The Second Circuit's memorandum decision makes clear, however, that it was vacated and ordered dismissed as moot.

[7]Section 401(b) was derived in part from § 16 of the Interstate Commerce Act of 1887, 24 Stat. 379, 384 (1887), providing for judicial enforcement of ICC orders against "carriers." While the statute contemplated judicial orders addressed to carriers directing compliance with ICC orders, the statute also authorized injunctions addressed to any "other person" when necessary to secure carrier compliance. 24 Stat. at 385 (1887). Section 401(a) was derived from the 1906 amendment to § 20 of the 1887 Act, 34 Stat. 584, 593-95 (1906), which also applied to "carriers." "Person" was substituted for "carrier" in the antecedents of both subsections, and the present language essentially appeared in the clean bill, S. 3285 (73d Cong., 2d Sess.) introduced by Senator Dill on April 4, 1934. 78 Cong. Rec. 5952 (1934).

As part of the Procedural and Administrative Provisions, § 401 is applicable to enforcement of all provisions of the chapter and orders thereunder.

[8]In defining most of the terms in § 153, Congress used the term "means." In defining "person," however, Congress chose to use the term "includes," as it did for only four other definitions in § 153.

[9] *See Highway & City Freight Drivers v. Gordon Transps., Inc.*, 576 F.2d 1285, 1289 (8th Cir.) (when statute describes what term "includes," "the fact that the statute does not specifically mention a particular entity . . . does not imply that the entity falls outside of the definition") (citing *Pfizer, Inc. v. India*, 434 U.S. 308, 312 n.9 (1978)), *cert. denied*, 439 U.S. 1002 (1978).

thermore, § 153 expressly gives courts leeway to interpret terms in the Act "[as] the context . . . requires." 47 U.S.C. § 153.

The purposes of § 401(b) and the structure of the Act strongly suggest that the PUC can be enjoined under § 401(b).[10] Section 401(b) is the sole mechanism Congress provided for the FCC, the federal government, or private parties to obtain enforcement of FCC orders against noncarriers.[11] Under appellants' interpretation, state regulatory commissions would be exempt from this statutory scheme. Rather than being required to challenge FCC orders under § 402,[12] state commissions would be free to violate FCC orders with impunity. They would be equally immune to private enforcement actions and to enforcement actions brought by the FCC and the federal government.

State commissions have the same opportunity as others to seek review of FCC orders under § 402. *See, e.g., State Corpo-*

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[10]Several federal courts have held that state regulatory commissions are persons under § 401(b). *New England Tel. & Tel. Co v. Public Util. Comm'n*, 570 F. Supp. 1558, 1568-69 (D. Me. 1983), *rev'd on other grounds*, 742 F.2d 1 (1st Cir. 1984), *cert. denied*, 106 S. Ct. 2902 (1986); *Mountain States Tel. & Tel. Co. v. Department of Pub. Serv. Reg.*, 588 F. Supp. 5, 7 (D. Mont. 1983); *see also Illinois Bell Tel. Co. v. Illinois Commerce Comm'n*, 740 F.2d 566 (7th Cir. 1984); *WUTC v. FCC*, 513 F.2d 1142, 1145-46, 1152 (9th Cir.) (holding state commission had standing to challenge validity of FCC order under § 402(a), implicitly concluding that WUTC was a "person who is aggrieved or whose interests are adversely affected" under § 402(b)(6)), *cert. denied*, 423 U.S. 836 (1975).

[11]Civil actions for enforcement and review of the Communications Act and orders made under the Act are governed by 47 U.S.C. §§ 401-415. Following promulgation of an order by the FCC, any aggrieved party can petition for rehearing. *Id.* § 405. Sections 401(a) & (c) permit the FCC to prosecute violations of the chapter.

[12]Parties seeking to challenge the validity of FCC orders must do so through actions in the circuit courts under 47 U.S.C. § 402 and 28 U.S.C. § 2342(1). *FCC v. ITT World Communications, Inc.*, 466 U.S. 463, 468 (1984).

ration Commission v. FCC, 787 F.2d 1421 (10th Cir. 1986); *New York State Commission on Cable TV v. FCC*, 669 F.2d 58, 62 n.8 (2d Cir. 1982); *North Carolina Utilities Commission v. FCC*, 552 F.2d 1036 (4th Cir.), *cert. denied*, 434 U.S. 874 (1977). No logical ground supports excluding state commissions from the group of persons against whom enforcement of orders may be sought. *New England Telephone & Telegraph Company v. Public Utilities Commission*, 570 F. Supp. 1558, 1569 (D. Me. 1983), *rev'd on other grounds*, 742 F.2d 1 (1st Cir. 1984), *cert. denied*, 106 S.Ct. 2902 (1986). Moreover, since § 401(a), which authorizes district courts to enjoin violations of the Act itself, also contains the term "person," state commissions would be immune from enforcement of the Act in general.[13] It is unlikely that Congress could have intended this result.

[1] We hold that the PUC is a person for purposes of § 401(b).[14] We also note that, even if the PUC does not itself constitute a person subject to a § 401(b) enforcement action, the individual Commissioners clearly are "individuals" under § 153(i).[15] Because the Commissioners qualify as persons for purposes of § 401(b) injunctions, the district court would not lack subject matter jurisdiction even if the PUC were not a person.

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[13]Section 401(a), 47 U.S.C. § 401(a), provides in part:

> (a) The district courts of the United States shall have jurisdiction, upon application of the Attorney General of the United States at the request of the Commission, *alleging a failure to comply with or a violation of any of the provisions of this chapter by any person*, to issue a writ or writs of mandamus commanding such person to comply with the provisions of this chapter.

Id. (emphasis supplied).

[14]Appellants also claim that holding the PUC to be a person under § 401(b) derogates the express provisions of § 152(b). The effect of § 152(b) is addressed in connection with our preemption analysis, *infra*.

[15]HawTel's complaint named the individual Commissioners as defendants, along with the PUC. The district court permanently enjoined both the Commissioners individually and the PUC.

B. *Whether FCC Order 81-312 is an "Order" for Purposes of § 401(b)*

The next question is whether FCC Order 81-312 constitutes an "order of the Commission" within the meaning of § 401(b).[16] Appellants maintain that it does not because the Order resulted from a rulemaking as opposed to an adjudicatory proceeding. The gist of appellants' argument has been accepted by the First Circuit. *New England Telephone & Telegraph Co. v. Public Utilities Commission of Maine*, 742 F.2d 1 (1st Cir. 1984), *cert. denied*, 106 S. Ct. 2902 (1986) [hereafter *New England Telephone v. Maine*]. In contrast, the Seventh Circuit has affirmed the grant of an injunction under § 401(b) to enforce a nonadjudicatory order. *Illinois Bell Telephone Company v. Illinois Commerce Commission*, 740 F.2d 566, 571 (7th Cir. 1984).

In *New England Telephone v. Maine*, the First Circuit based its decision primarily on two grounds. First, the court adopted the distinction between "rules" and "orders" that appears in the Administrative Procedure Act[17]. Second, it concluded that the central role of the FCC in enforcing the Communications Act, and its sole power to seek injunctions under § 401(a), suggested that the scope for private enforcement under § 401(b) should be narrow.[18] The court therefore

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[16]The phrase "order of the Commission" is not defined in the Communications Act.

[17] The APA defines the term "order" as "a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making." 5 U.S.C. § 551(6).

The First Circuit also cited Congress' use of the term "order" in several other provisions of the Communications Act, which it interpreted to signify only FCC adjudicatory orders and not FCC rules. *New England Telephone v. Maine*, 742 F.2d at 7. (citing 47 U.S.C. §§ 201, 204, 205, 209, 214(d) & 416(a)).

[18]The First Circuit further noted that treating FCC rules as orders under § 401(b) would require district judges with no special expertise regarding

concluded that an FCC directive that it considered to be the product of a rulemaking proceeding, and that was not specifically directed at the parties against whom enforcement was sought, was not enforceable under § 401(b).

Like several other circuit courts,[19] we disagree with the

FCC rules to determine in the first instance the scope and meaning of those rules. Allowing 700 different judges to make such determinations would lead to inconsistent interpretations of the FCC rules and threaten "the sound development of a coherent nationwide communications policy," which was "a central objective of the 1934 Act." *New England Telephone v. Maine*, 742 F.2d at 5-6.

The First Circuit was also concerned about allowing injunctions against parties who were not involved in the proceeding in which a rule was promulgated. *See id.* at 6-7.

[19]For substantially the same reasons discussed *infra*, the Fourth, Fifth, and Eighth Circuits, as well as the federal court for the District of Washington, have expressly or implicitly rejected the analysis of *New England Telephone v. Maine* in a series of decisions that have been vacated and remanded or reversed on other grounds. *Chesapeake & Potomac Tel. Co. v. Public Serv. Comm'n*, 748 F.2d 879, 880-81 (4th Cir. 1984), *vacated and remanded for proceedings consistent with Louisiana Pub. Serv. Comm'n v. FCC, infra*, 106 S. Ct. 2239 (1986) (per curiam) (mem.); *South Central Bell Tel. Co. v. Louisiana Pub. Serv. Comm'n*, 744 F.2d 1107, 1115 (5th Cir. 1984), *vacated and remanded for consideration in light of Chesapeake & Potomac, supra*, 106 S. Ct. 2884 (1986) (mem.); *Southwestern Bell Tel. Co. v. Arkansas Pub. Serv. Comm'n*, 738 F.2d 901 (8th Cir. 1984), *vacated and remanded for consideration in light of Chesapeake & Potomac, supra*, 106 S. Ct. 2885 (1986) (mem.); *Virginia State Corp. Comm'n v. FCC*, 737 F.2d 388 (4th Cir. 1984), *rev'd on other grounds sub nom. Louisiana Pub. Serv. Comm'n v. FCC*, 106 S. Ct. 1890 (1986); *Pacific Northwest Bell Tel. v. Washington Util. & Transp. Comm'n*, 565 F. Supp. 17, 21 (D. Wa. 1983), *vacated and remanded in light of Louisiana Pub. Serv. Comm'n, supra*, No. 83-3746 (9th Cir. 1986).

The First Circuit's result also conflicts with the Seventh Circuit's decision in *Illinois Bell Tel. Co.*, 740 F.2d 566 (ordering state commission compliance with FCC order relating to Separations Procedures), and the injunction granted by the federal court for the District of Kansas in *Southwestern Bell Tel. Co. v. State Corp. Comm'n*, No. 83-4090 (D. Kan. Apr. 8, 1983).

First Circuit's reasoning. So did the FCC. *See New England Telephone v. Maine,* 742 F.2d at 10-11.

[2] To begin with, we find no authority supporting the proposition that the APA's rule-order distinction should be imported into the Communications Act. *See* 5 U.S.C. § 551 (use of APA's definitions is mandatory only when APA itself is applicable). In fact, the Communications Act's legislative history indicates that § 401(b) was modeled in part after § 16 (12) of the Interstate Commerce Act, 49 U.S.C. § 16 (12) (repealed). The wording of the two provisions is virtually identical, *see* S. Rep. No. 781, 73d Cong., 2d Sess. 9 (1934). In *Pacific Fruit Express Company v. Akron, Canton & Youngstown Railroad,* 524 F.2d 1025, 1028-31 (9th Cir. 1975), *cert. denied,* 424 U.S. 911 (1976), we held that § 16 (12) authorizes private in junctive actions to enforce ICC rules. The same result would seem to follow for FCC rules under § 401(b).

[3] Second, the language of other sections of the Communications Act shows that Congress did not intend to limit § 401(b) exclusively to adjudicatory orders as the APA defines them. When Congress intended the APA's definition of a given term to be incorporated into the Communications Act, it said so. *E.g.*, 47 U.S.C. §§ 409(a)-(c) (incorporating APA's definition of "adjudication"). Congress never provided that the APA's definition of "order" should extend to § 401(b).[20]

[20]Two Supreme Court decisions also seem to support the conclusion that Congress intended the term "order" in § 401(b) to encompass FCC rules. In *CBS, Inc. v. United States,* 316 U.S. 407, 425 (1942), the Court held that FCC rules constitute orders for purposes of § 402(a) of the Act. Because Congress did not indicate any intention that "order" should have a different meaning in § 401(b) from § 402, it appears that FCC rules can be construed to constitute orders for purposes of § 401(b). *But see New England Telephone v. Maine,* 742 F.2d at 8 (distinct functions of sections 401(b) and 402 dictate a far broader interpretation of "order" in § 402 than in § 401(b)).

We do not believe that our interpretation of § 401(b) displaces the FCC from its central role in the enforcement of the Act. The FCC has broad discretion to act through either case-by-case adjudication or the rulemaking process. *See United States v. Southwestern Cable Company*, 392 U.S. 157, 180-81 (1968); *see also SEC v. Chenery Corporation*, 332 U.S. 194, 202-03 (1947) (citing *CBS, Inc. v. United States*, 316 U.S. 407, 421 (1942)). Thus, the FCC can tailor directives to the needs of particular circumstances. Moreover, the FCC can intervene or file amicus briefs in § 401(b) actions or even invoke the doctrine of primary jurisdiction. *See, e.g., United States v. Yellow Freight System, Inc.*, 762 F.2d 737, 739 (9th Cir. 1985) (primary jurisdiction doctrine authorizes suspension of district court proceedings to allow agency to express views on pending issues within agency's special competence); *but see New England Telephone v. Maine*, 742 F.2d at 11 (noting that primary jurisdiction doctrine lacks needed clarity and efficiency). These mechanisms help to prevent substantially inconsistent application of FCC rules and serious judicial encroachment on FCC responsibilities.

[4] We need not decide today whether every rule, order, or regulation promulgated by the FCC is an enforceable order under § 401(b), however. The language of the particular order in question, and the proceedings leading up to it, demonstrate that the FCC intended Order 81-312 to require particular actions be taken by the PUC and private carriers providing service to Hawaii.[21] Appellant PUC conceded that it must

In *Ambassador, Inc. v. United States*, 325 U.S. 317 (1945), the Supreme Court upheld a § 401 injunction granted to enforce tariff regulations imposed by a telephone company in compliance with a FCC rulemaking order. *Id.* at 325. To the extent that *Ambassador* involved a § 401(b) injunction, it also supports the injunction in this case.

[21]*See* FCC Order 81-312, 87 F.C.C.2d 18, which in pertinent part provides:

abide by those FCC-mandated separations procedures. Under the circumstances, we conclude that FCC Order 81-312 was appropriately interpreted as an "order" for enforcement by injunction in the district court.

C. *Whether FCC Order 81-312 was "Regularly Made"*

Appellants' final challenge to jurisdiction under § 401(b) seizes upon that section's requirement that an order be "regularly made" by the FCC. They contend that a substantive determination must be made that the FCC had authority to make Order 81-312. Appellants argue that the Commission was without authority to mandate a specific separations method for intrastate ratemaking.

[5] We think that "regularly made" in § 401(b) simply refers to procedural regularity. The substantive validity of FCC orders can be challenged only through actions under § 402(a). *ITT World Communications, Inc.*, 466 U.S. at 468 & n.5 (also noting in dicta that challenges to validity of *past* agency conduct should be brought through actions for FCC declaratory rulings under doctrine of primary jurisdiction, not in district courts). It would defeat the purpose of § 402(a) to interpret § 401(b) to require a threshold finding of the FCC's authority to make particular rules. Appellants identify, and we have found, no procedural problems with the promulgation of

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3. IT IS FURTHER ORDERED That . . . the NARUC-FCC Separations Manual [Ozark Plan] . . . SHALL APPLY to Hawaii and Alaska.

4. IT IS FURTHER ORDERED That, Section 67.1 (e) of the Commission's Rules and Regulations, 47 C.F.R. § 67.1 (e), IS AMENDED to read as follows: These Separations Procedures apply to Puerto Rico, the United States Virgin Islands, Alaska and Hawaii.

Thus, the order was not merely interpretive, but instead was a mandate to apply the NARUC-FCC separations procedure.

Order 81-312. Consequently, the district court had subject matter jurisdiction under § 401(b) to issue the injunction.

II. THE JOHNSON ACT

As their final jurisdictional challenge, appellants argue that the Johnson Act, 28 U.S.C. § 1342, bars HawTel's action. The four conditions in the Johnson Act are conjunctive; therefore, all four conditions must be present to deprive the district court of jurisdiction.[22] *DeKalb County v. Southern Bell Telephone & Telegraph Company,* 358 F. Supp. 498, 504 (N.D. Ga. 1972), *aff'd,* 478 F.2d 700 (5th Cir. 1973); *United States v. Public Utilities Commission,* 141 F. Supp. 168, 188 (N.D. Cal. 1956), *aff'd,* 355 U.S. 534 (1958).

HawTel does not dispute that the final three conditions are met.[23] Instead, HawTel argues, and the district court found, that the Johnson Act is inapplicable because HawTel's action is not based "solely" on a claim of "repugnance of the order to the Federal Constitution." *See* 28 U.S.C. § 1342(1). Although appellee's action is based expressly on 47 U.S.C. § 401(b) and FCC Order 81-312, appellants contend that it is in essence a preemption claim under the Supremacy Clause.

[6] We have construed the term "solely" in § 1342(1) narrowly. The Johnson Act applies "only when [a challenge to a rate order] rests *exclusively* on 'repugnance of the order to the Federal Constitution.' " *International Brotherhood of Electrical Workers v. Public Service Commission,* 614 F.2d 206, 210-11 (9th Cir. 1980) (quoting 28 U.S.C. § 1342(1)) (emphasis supplied) (upholding federal jurisdiction because the union's action depended in part on an interpretation of National

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[22]*See supra* note 4.

[23]The PUC's decision possibly may affect interstate commerce, *see* 28 U.S.C. § 1342(2), because it interferes with an FCC-mandated system for apportioning costs between interstate and intrastate services. HawTel does not advance this argument, and we need not consider it today.

Labor Relations Act). A claim of preemption does not meet this test. *Id.* at 211. The district court was correct in holding that the Johnson Act did not bar appellee's action.

III. RES JUDICATA

[7] The district court also rejected appellants' contention that HawTel's claim is barred by res judicata. Appellants assert that HawTel argued that the PUC had misapplied FCC Order 81-312 when it appealed the PUC's 1981 rate order to the Hawaii Supreme Court.[24] Appellants contend that this issue is now foreclosed. Whether res judicata or collateral estoppel bars claims is a mixed question of law and fact subject to *de novo* review. *A&A Concrete, Inc. v. White Mountain Apache Tribe*, 781 F.2d 1411, 1414 (9th Cir.), *cert. denied*, 106 S.Ct. 2008 (1986).

HawTel offers several responses. First, HawTel contends that the Hawaii Supreme Court never squarely addressed its federal claim,[25] at least in part because the court exercises only limited review of rate cases. *See In re Application of Hawaii Electric Light Company*, 60 Haw. 625, 628-29, 594 P.2d 612, 617 (Haw. 1979). Thus, without citing the case, HawTel appears to invoke the principle of *Robinson v. Ariyoshi*, 753 F.2d 1468, 1472 (9th Cir. 1985), *vacated and remanded on other grounds*, 106 S.Ct. 3269 (1986), that collateral estoppel or res judicata effect will not be given to a

[24] To the extent HawTel did not assert that argument, appellants contend it should have and is now precluded from doing so. Appellants appear to argue at times that res judicata bars HawTel's district court action. At other times, they appear to argue that HawTel should be collaterally estopped from raising certain issues. Our conclusion is the same whichever doctrine appellants intend to argue.

[25] Res judicata prevents federal litigation of a federal constitutional claim that was or might have been raised in a prior state action. *Board of Trustees of Carpenters Pension Trust Fund v. Reyes*, 688 F.2d 671, 673 (9th Cir. 1982) (noting appellant's failure to seek United States Supreme Court review of the state court judgment), *cert. denied*, 462 U.S. 1120 (1983).

state court decision when the complaining party did not have a "full and fair opportunity to litigate a claim in state court or where the state court demonstrated inability or unwillingness to protect federal rights." *Id.* There is some support in the record for HawTel's characterization of the Hawaii Supreme Court's decision, but we need not rule upon this contention because we find Hawtel's second argument dispositive.

HawTel's second point is that there is such a disparity between the contexts of the PUC decisions in Dockets 4306 and 4588 that neither res judicata nor collateral estoppel can apply. We agree. The two dockets involve different rate periods, with different rate bases. The causes of action are clearly not the same, and res judicata cannot apply. *See Commissioner v. Sunnen,* 333 U.S. 591, 597-98 (1948) (income tax claims for successive tax years not same cause of action for res judicata purposes). It is true that collateral estoppel may apply and foreclose the litigation of issues that were actually litigated and decided in a previous action, even though the causes of action differ. *Id.* at 598-99. But in successive rate proceedings, as in successive tax cases, there are strong policy reasons for denying the application of collateral estoppel when variations in either facts or law occur. An issue once decided may create inequities in the continuing administration of the law if applied by estoppel to later years. *Id.* at 599-600.

[8] Here we conclude that there were sufficient differences between the PUC actions in Dockets 4306 and 4588 to militate against the application of collateral estoppel to the 1.1 percent rate downward rate adjustment. Although essentially the same adjustment was applied, it was applied to different rate periods, with different revenues, different expenses, and different investments. *See Papago Tribal Utility Authority v. FERC,* 776 F.2d 828, 833 n.5 (9th Cir. 1985), *cert. denied,* 106 S.Ct. 1515 (1986). When Docket 4306 was decided, HawTel was operating under its transition agreement with AT&T. Among other things, that agreement provided for payments

to HawTel to soften the impact on its overall revenues of the mandated shift to the Ozark Plan. In contrast, Docket 4588 involved rates effective January 1, 1985, after the transition agreement had expired.[26] If, in this new setting, the 1.1 percent adjustment did violate the FCC separations rule, HawTel should be free to raise the issue, rather than to suffer a continuing violation of a policy set by the FCC. HawTel is not collaterally "appealing" the Hawaii Supreme Court's decision, but is challenging the lawfulness of the PUC's action in Docket 4588. PUC Docket 4588 has not been ruled upon by the Hawaii court, or any other court. We conclude that the district court properly rejected the application of res judicata and collateral estoppel.[27]

IV. PREEMPTION OF THE SEPARATIONS FIELD

[9] Reaching the merits, appellant Consumer Advocate contends that FCC Order 81-312 did not preempt state regu-

[26] In its Judgment for Permanent Injunction ¶ 15, the district court noted this distinction:

> The declared purpose behind the PUC adjustment is to have Hawaii intrastate ratepayers share in the transitional supplement received by HTC under the HTC-AT&T agreement approved by the FCC in 1981. Yet presumably Hawaii intrastate ratepayers have received some benefit from that agreement by a slowing down of increases in intrastate rates. Furthermore, that agreement, and supplements under the agreement, terminated on December 31, 1984. The rates set in PUC Docket No. 4588, however, remain in place indefinitely until modified in another future proceeding before the PUC.

Id.

[27] HawTel also argued that because federal courts have exclusive jurisdiction under § 401(b) to enforce FCC Orders, the state court determination cannot preclude federal review even if the state court reached the merits of its federal claim. *See Southern Pacific Transp. Co. v. Public Utilities Comm'n*, 716 F.2d 1285, 1289-90 (9th Cir. 1983), *cert. denied*, 466 U.S. 936 (1984). We need not reach this issue, and express no view on the merits of appellees' contentions regarding exclusive jurisdiction, or on that possible ground for collateral attack on the state court's decision.

lation of separations procedures and that the PUC's use of state-developed procedures was perfectly proper for intrastate ratemaking. This argument raises a question of law reviewed here *de novo*. *United States v. McConney*, 728 F.2d 1195, 1201 (9th Cir.) (en banc), *cert. denied*, 469 U.S. 824 (1984).

Appellants concede the FCC's plenary authority over separations procedures, but argue in their Joint Brief that the FCC has not exercised this power. They point to the absence of an express statement of intention to preempt the field of separations for intrastate ratemaking purposes in FCC Order 81-312.[28] They argue that the applicable test for preemption is whether both the state and federal regulations "can be enforced without impairing the federal superintendence of the field." *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963).

Appellants' argument overlooks the extent to which separations for interstate ratemaking and separations for intrastate ratemaking are two sides of the same coin.[29] When the same plant and equipment is used to provide both interstate and intrastate services and different authorities set rates for these respective services, cost and investment must be apportioned uniformly in order to establish fair rates. *See The Minnesota Rate Cases*, 230 U.S. 352, 435 (1913); *Washington Utilities & Transportation Commission v. FCC*, 513 F.2d 1142, 1146 (9th Cir.), *cert. denied*, 423 U.S. 836 (1975). If the sum of the

[28]In this respect, appellants' brief contradicts the PUC's earlier concessions in Docket 4588 and in the Hearing on Motion for Preliminary Injunction, that the PUC must apply the FCC-mandated separations procedures. Counsel for the PUC stated that the PUC agreed with Hawtel and "the FCC that the separations formula must remain intact for each governmental authority to assert its own jurisdiction."

[29]Thus the question is not whether federal separations procedures preempt state ratemaking. It is whether federal separations procedures preempt any inconsistent separations adopted, openly or otherwise, by the state for the purposes of establishing the intrastate rate base.

intrastate and interstate portions for rate-base allocation purposes were not 100 percent,

> some costs of plant and expenses would not be included in the rate computations of either [the PUC or the FCC]. In [that] situation . . ., the "carrier may be deprived of a fair rate of return when interstate and intrastate jurisdictions are both taken into account."

Application of Hawaiian Tel. Co., 67 Haw. ___, 689 P.2d at 751-52 (quoting *New England Tel. & Tel. Co. v. Public Utilities Comm'n*, 448 A.2d 272, 298 (Me. 1982)). *See also Illinois Bell*, 740 F.2d at 567; *Washington Utilities & Transportation Commission*, 513 F.2d at 1146-47 (recognizing complementary nature of the separations process).

[10] The Communications Act empowers the FCC to prescribe uniform separations procedures. *Illinois Bell*, 740 F.2d at 567; *see* 47 U.S.C. § 221(c) (granting FCC authority to classify property for interstate or foreign telephone toll service); *id.* § 410(c) (requiring use of Federal-State Joint Board for separations rulemaking). These statutes evince a congressional intent that FCC separations orders control the state regulatory bodies, because a nationwide telecommunications system with dual intrastate and interstate rates can operate effectively only if one set of separations procedures is employed. *E.g., State Corporation Commission v. FCC*, 787 F.2d 1421, 1426-27 (10th Cir. 1986) (citing cases); *see Louisiana Public Service*, 106 S. Ct. at 1902 (citing *Smith v. Illinois Bell Telephone Co.*, 282 U.S. 133 (1930)); S. Rep. No. 92-362, 92d Cong., 1st Sess., *reprinted in* 1971 U.S. Code Cong. & Admin. News 1511, 1513, 1515 (noting need to preserve federal superintendence in the separations field, citing *Smith v. Illinois Bell, supra*); *see also NARUC v. FCC*, 746 F.2d 1492, 1499-1501 (D.C. Cir. 1984); *In re Establishment of Interstate Toll Settlements & Jurisdictional Separations Requiring the Use of Seven Calendar Day Studies by the Florida Pub. Serv.*

Comm'n, Memorandum Opinion & Order on Reconsideration (Docket No. 84-268), 98 F.C.C.2d 777-84 (1984); *In re AT&T & the Associated Bell System Companies Charges for Interstate & Foreign Communication Service,* Interim Decision & Order (Docket Nos. 16258 & 15011), 9 F.C.C.2d 30, 90-91 (1967).

The FCC's statements during the lengthy Ozark Plan proceedings indicate a desire to adopt a separations scheme agreeable to as many states as possible because that scheme will apply to the entire nation. *E.g., Prescription of Procedures for Separating and Allocating Plant Investment, Operating Expenses, Taxes and Reserves Between the Intrastate and Interstate Operations of Telephone Companies,* Report & Order 70-1151 (Docket 18866), 26 F.C.C.2d 247, 257 (1970). In 1972, the FCC began efforts to integrate Hawaii "into the established rate scheme for communications services applicable to the Mainland." Docket No. 16495, 35 F.C.C.2d at 856-57. The FCC extended Ozark to Hawaii as a central part of that rate scheme in Order 81-312, expressly citing its separations authority under § 221(c) and following the procedure set forth by § 410(c).

[11] This history, the statutory framework underlying it, and the need for consistent apportionment between interstate and intrastate operations, are sufficient to convince us that FCC Order 81-312 necessarily preempted any independent separations procedures of the Hawaii PUC.

V. LOUISIANA PUBLIC SERVICE *AND § 152(b)*

In its recent decision in *Louisiana Public Service,* the Supreme Court held that § 152(b) of the Act bars "federal preemption of state regulation over depreciation of dual jurisdiction property for intrastate ratemaking purposes." 106 S.Ct. at 1904. Section 152(b) provides:

> [N]othing in this chapter shall be construed to apply or to give the [FCC] jurisdiction with respect to (1)

> charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier. . . .

47 U.S.C. § 152(b). Appellants argue that this provision, and the *Louisiana Public Service* decision, support their view that the FCC cannot dictate separations practices to the states for use in their intrastate ratemaking. We disagree.

The Supreme Court made it quite clear in *Louisiana Public Service* that federal separations procedures were an essential prerequisite to the creation of independent spheres of federal and state power over communications:

> The Communications Act not only establishes dual state and federal regulation of telephone service; it also recognizes that jurisdictional tensions may arise as a result of the fact that interstate and intrastate service are provided by a single integrated system. Thus, the Act itself establishes a process designed to resolve what is [sic] known as "jurisdictional separations" matters, by which process it may be determined what portion of an asset is employed to produce or deliver interstate as opposed to intrastate service. 47 U.S.C. § 410(c). Because the separations process literally separates costs such as taxes and operating expenses between interstate and intrastate service, it facilitates the creation or recognition of distinct spheres of regulation.

Louisiana Public Service, 106 S. Ct. at 1902. *See also id.* at 1899 ("the jurisdictional limitations placed on the FCC by § 152(b), coupled with the fact that the Act provides for a 'separations' proceeding to determine the portions of a single asset that are used for interstate and intrastate service. 47 U.S.C. § 410(c), answer" arguments for preemption of depreciation).

[12] Thus, it is only *after* a uniform separations formula has been applied that a state's independent depreciation rule for intrastate ratemaking can be protected from federal preemption. *See Smith v. Illinois Bell,* 282 U.S. at 148. The Supreme Court's decision in *Louisiana Public Service* accordingly supports our conclusion that the FCC separations procedures authorized by § 410(c) of the Act bind the states, and that § 152(b) does not stand in the way.[30]

VI. PUC DISOBEDIENCE OF THE FCC ORDER

Finally, appellants contend that the PUC did not disobey the FCC order. The district court found that it did. We review factual findings for clear error. *E.g., United States v. McConney,* 728 F.2d at 1201.

We have already determined that the FCC properly preempted the separations field, employing the authority granted by the Communications Act. No one disputes the authority of a state PUC to establish a reasonable rate of return for utilities within its jurisdiction. But, as the district court found, the "appropriate adjustment" here was a fairly transparent and improper attempt to circumvent the FCC mandate. *Cf. Aloha Airlines, Inc. v. Director of Taxation,* 464 U.S. 7, 12-13 (1983) (state could not circumvent preemptive federal Act prohibiting gross receipts tax on airlines by calling its tax a "property

[30]Appellants contend that, even after imposition of a federal separations formula, PUC remains free to impose variations. If, for example, the FCC decides that interstate rates should be based on 25% of an employee's $20 per hour wage, the PUC need not accept a base of the remaining $15. The PUC remains free to determine that a $20 wage is unreasonable for state ratemaking purposes, while a $16 wage is reasonable. The PUC could then base its rates on 75% of that figure, or $12.

We accept this argument, but it does not apply directly to this case. What the PUC cannot do is concede that a $20 wage is reasonable for intrastate ratemaking purposes, but nevertheless base its rate on $12 of the wage because it thought that the interstate proportion of the wage, set by the FCC at 25%, was too low. That example is more nearly analogous to this case.

tax measured by gross receipts"). The Supremacy Clause does not countenance state policies—in this case, a state ratemaking ruling—that may produce results inconsistent with the objective of a federal statute. *E.g., Maryland v. Louisiana*, 451 U.S. 725, 747 (1981).

[13] The undisputed evidence is that, while the PUC initially used the Ozark Plan to calculate rates, it then adjusted rates downward by 1.1 percent. The PUC arrived at its 1.1 percent "Adjustment for Change in Separation Plan" by comparing 1981 rates under the Ozark Plan and under Hawaiian Plan II. It also took into account the transitional payments from AT&T even though it acknowledged that these had to be considered as interstate revenues. The district court did not clearly err in finding that this adjustment was an attempt to nullify the FCC's Ozark separations plan. Although no new comparison was performed in 1984 in Docket 4588, the PUC expressly carried over the 1.1 percent adjustment even after it found that 11.25 percent was a reasonable rate of return and that a rate increase of $30 million was necessary to achieve the 11.25 percent return.[31] Appellants offered only the explanation that the 1.1 percent adjustment resulted from the PUC's determination, within its proper authority, that the adjustment was "necessary, fair and reasonable." PUC Decision & Order No. 8042, Docket No. 4588 at 15 (noting that adjustment would be treated as an adjustment to expenses). No support for such a finding appears in the PUC order or in evidence, however.

[14] Rather than simply accept the PUC's statements that it was applying the Ozark Plan, the district court properly considered the effect of the PUC's ruling to determine whether it conflicted with federal law. *See Perez v. Campbell*,

[31]The PUC made it quite clear that its adjustment in Docket No. 4588 was not independent of its original adjustment in Docket No. 4306. "We find no reason to deviate from our previous decision." Decision & Order No. 8042, Docket No. 4588, at 14.

402 U.S. 637, 652 (1971); *New York State Commission on Cable TV v. FCC*, 669 F.2d 58, 62 (2d Cir. 1982). Reviewing the record, we conclude that the district court committed no clear error in finding that "[t]he so-called 'appropriate adjustment' . . . in Docket No. 4588 was calculated solely and precisely on the difference between the Hawaiian Plan II and Ozark Separations formulas." Judgment for Permanent Injunction ¶ 13. That finding supports a conclusion that PUC violated the FCC-imposed Ozark Plan.

CONCLUSION

The district court's injunction is authorized under § 401(b) and its decision to accord preemptive weight to FCC Order 81-312 does not violate the dual regulatory system prescribed under the Communications Act. The court did not clearly err in finding that the PUC's rate-of-return adjustment was in effect a thinly veiled attempt to depart from the required separation of plant and expenses between interstate and intrastate use. The PUC clearly has supreme authority with regard to intrastate ratemaking; but the PUC is not entitled to define boundaries of its intrastate sphere that are different from those established by the valid FCC order. Nor can the PUC accomplish by subterfuge what it could not, by its own admission, do directly.

The order of the district court enjoining the PUC and its Commissioners is therefore AFFIRMED.

FERGUSON, Circuit Judge, dissenting:

I dissent. The majority opinion misconstrues and misapplies the Supreme Court's recent decision in *Louisiana Public Service Commission v. FCC*, 106 S. Ct. 519 (1986), and in so doing pays scant heed to the important federalism concerns that lie at the heart of this case. As the Supreme Court has

pointed out in a different context, "the essence of federalism is that States must be free to develop a variety of solutions to problems and not be forced into a common uniform mold." *Addington v. Texas*, 441 U.S. 418 (1979). The Supremacy Clause of Art. VI of the Constitution does, of course, give Congress the power to preempt state law. *See Louisiana*, 106 S. Ct. at 1898. Absent a congressional mandate, however, it is not appropriate for either the FCC or this court to abridge the authority of the Hawaii Public Utilities Commission ("PUC") to set intrastate rates for telephone services. The Court's decision in *Louisiana* makes clear that 47 U.S.C. § 152(b) constitutes a congressional denial of power to the FCC to regulate intrastate rate-making. For this reason, I would reverse the decision of the district court.

The threshold issue is, as the majority points out, the question of whether the district court had jurisdiction to require the PUC to obey an FCC order raising the intrastate rates for Hawaii Telephone ("HawTel"). Whether the district court had jurisdiction depends on whether there was an enforceable FCC order under 47 U.S.C. § 401(b). Whether there was an enforceable order under section 401(b) depends, in turn, on whether intrastate rate-making is preempted by the uniform separations process.

It is undisputed that the Communications Act empowers the FCC to prescribe uniform separations procedures for apportioning the property and expenses of telephone companies between the interstate jurisdiction, governed by the FCC, and the intrastate jurisdiction, governed by state regulatory authorities. *See* 47 U.S.C. §§ 221(c), 410(c). The issue, however, is whether, once that apportionment is made according to FCC procedures, the FCC can require the state to follow the uniform procedures when establishing intrastate rates. Simply stated, the question is whether state regulatory authorities are preempted by 47 U.S.C. §§ 221(c) and 410(c) from making adjustments in setting intrastate rates. The Supreme Court's decision in *Louisiana* leaves no doubt that

there is no federal preemption in the area of intrastate regulation, even where intrastate regulation has an impact on interstate communications. Under *Louisiana*, therefore, this court should find that the district court had no jurisdiction to enforce the FCC's order.

The issue in *Louisiana* was whether state regulation of depreciation methods and rates for telephone companies was preempted by rulings of the FCC. The Court held that 47 U.S.C. § 152(b) bars federal preemption of state regulation of depreciation of "dual jurisdiction" property for intrastate rate-making purposes, notwithstanding 47 U.S.C. § 220, which expressly directs the FCC to prescribe depreciation practices. The FCC argued in *Louisiana* that section 220 operates to preempt inconsistent state depreciation regulations even for intrastate rate-making purposes, and that such federal displacement of state regulation was justified as necessary to avoid frustration of valid federal policies. The Supreme Court rejected this argument, noting the "express jurisdictional limitations" of section 152(b) and stating that "by its terms this provision fences off from FCC reach or regulation intrastate matters—indeed including matters 'in connection with' intrastate service." 106 S. Ct. at 1899. The Court noted that the Act itself establishes a process for resolving jurisdictional separations issues, 47 U.S.C. § 410(c), and stated that "it is possible to apply different rates and methods of depreciation to plant once the correct allocation between the interstate and intrastate use has been made." *Id.* at 1902.

Applying the reasoning of *Louisiana*, it is clear that once jurisdictional separations were made, the PUC was not preempted from making an adjustment to intrastate rates alone. Section 152(b) expressly denies the FCC jurisdiction over "charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service." 106 S. Ct. at 1899. The Supreme Court noted that this section contains not only a substantive jurisdictional limitation on the FCC's power, but also a rule of statutory con-

struction (". . . nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to . . . intrastate communication service"). Thus, in *Louisiana*, the FCC could not rely on the specific grant of authority to prescribe depreciation procedures contained in section 220 to defeat the express limitations of section 152(b). Similarly, here, once apportionment between State and Federal jurisdictions is made under section 410(c), the FCC may not further rely on that section to invade the authority specifically denied the agency under section 152(b). As the Court points out, the separations process itself "facilitates the creation or recognition of distinct spheres of regulation." *Id.* at 1902.

Nor, under *Louisiana*, may the FCC compel a different result by arguing that the PUC's adjustment of intrastate rates was preempted as an evasion of the separations procedure. The Supreme Court makes clear in the *Louisiana* decision that arguments about the effect or impact of state regulation will not confer preemptive authority on the FCC if the agency is acting outside the scope of its congressionally delegated authority. In *Louisiana*, the FCC argued that the express limitations on federal authority contained in section 152(b) should not bar the FCC from requiring state commissions to follow FCC depreciation practices for intrastate ratemaking purposes, because the plant involved was used interchangeably to provide both intrastate and interstate service; and that any authority reserved to the states under section 152(b) should be confined to intrastate matters which are separable from and do not substantially affect interstate commerce.

The Supreme Court rejected this argument, noting:

> While it is certainly true, and a basic underpinning of our federal system, that state regulation will be displaced to the extent that it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress, it is also true that

> a federal agency may preempt state law only when and if it is acting within the scope of its congressionally delegated authority.

Id. at 1901 (citation omitted).

The Court went on to explain that an agency literally has no power to act, let alone preempt state law, until Congress confers authority on it; and that the best way of determining whether Congress intended the agency's regulations to displace state law is to examine the scope of the authority granted to the agency by the legislature. *Id.* Applying these principles, the Court reiterated that section 152(b) constitutes a congressional denial of power to the FCC, and concluded therefore that "we simply cannot accept an argument that the FCC may nevertheless take action which it thinks will best effectuate a federal policy." *Id.*

The argument that HawTel made, and the district court accepted, that the Hawaii PUC's actions constituted an evasion of the federal separations procedures, is essentially the same kind of argument that the Court rejected in *Louisiana*. *Louisiana* stands for the proposition that an agency may not expand its jurisdiction beyond that granted by Congress, regardless of the policy arguments that the agency may make in support of greater preemptive power. Thus, under the principles of *Louisiana* the first question to ask is whether there is a congressional grant of authority to the agency. It is clear from the statute that Congress has authorized the FCC to establish separation procedures. However, error arises if it is concluded that this grant of authority extends to intrastate rate-making, as the authority of the FCC in this area is clearly limited by the express provisions of section 152(b). According to *Louisiana*, HawTel cannot bypass that express limitation by reference to the impact or effect of the state's exercise of authority on interstate communications. The Court explicitly holds that the authority reserved to the state regulatory authorities under section 152(b) is not limited to those areas

where the matter to be regulated is "purely local" and where interstate communications are not affected by the state regulation. Dismissing this approach, the Court states "the short answer to this argument is that it misrepresents the statutory scheme and the basis and test for preemption. 106 S. Ct. at 1901.

I conclude therefore that the FCC order was not enforceable under 47 U.S.C. § 401(b), as the federal agency had no authority to intervene in the purely intrastate rate-making of the PUC. The PUC accepted the FCC order in the initial separations process and allocated property and expenses between the intrastate and interstate jurisdictions accordingly. Once that process was complete, the authority of the FCC terminated, as, under section 152(b), the FCC may not require compliance with federal standards in intrastate rate-making, arguments about the effect of such rate-making on interstate communications notwithstanding. Thus, the district court was without jurisdiction to issue the injunction.

To hold otherwise subverts the operation of the federalism that Congress has mandated. The FCC regulates interstate rates. The state PUCs regulate intrastate rates. That rule may not work as the telephone companies would like.but that is a problem that Congress must solve.[1] Only Congress can extend the jurisdiction of a federal agency, not the courts. Were proposals before Congress to confer jurisdiction on the FCC over intrastate rates, they would doubtless engender a considerable political controversy. However, Congress has not acted, and the Supreme Court has said in no uncertain terms that the FCC may not assume jurisdiction merely because it thinks to do so would make for a more efficient system.[2]

[1] It is hard to escape the conclusion that, as in *Louisiana*, "what is really troubling [the appellees] is their sense that state regulations will not allow them sufficient revenues." 106 S. Ct. at 1902. While recognizing that concern, as the Court pointed out, "only Congress can rewrite the statute." *Id.*

[2] It should be emphasized that a decision by this panel that there was no enforceable order under 47 U.S.C. § 401(b) would not leave the telephone

I have set forth in detail my reasons for dissenting from the majority's analysis of the impact of *Louisiana* because the majority ignores the important federalism concerns which must be addressed when federal regulatory agencies attempt to assert authority over intrastate decision-making absent a clear mandate from Congress. I believe, however, that this court does not need to reach the preemption issue as HawTel's suit here is collaterally estopped by the decision of the Hawaii Supreme Court in *In re Hawaii Telephone Co.*, 689 P.2d 741 (Haw. 1984).

The majority concludes that collateral estoppel does not apply because of the factual differences between the two actions. The majority concedes that both actions concerned HawTel's appeal of essentially the same downward adjustment in intrastate rates, but argues that because the adjustment was applied in different rate periods, with different revenues, different expenses, and different investments, the second suit is not a collateral appeal of the first.

The principle of collateral estoppel "is designed to prevent repetitious lawsuits over matters which have once been decided and which have remained substantially static, factually and legally." *Commissioner v. Sunnen*, 333 U.S. 591, 599 (1948). In the context of claims involving tax liability in different tax years, the Supreme Court noted that "the prior judgment acts as collateral estoppel only as to those matters in the second proceeding which were actually presented and determined in the first suit," *id.* at 598, cautioning that "a subsequent modification of the significant facts or a change in the controlling legal principles may make that determination obsolete or erroneous, at least for future purposes," *id.* at 599.

companies without any means of challenging the rate-setting of state rate-setting commissions. Apart from any federal constitutional claims, there are also a number of state grounds on which decisions or orders of state regulatory agencies may be challenged in state courts. *See, e.g.*, Haw. Rev. Stat. § 91-14(g) (1976).

The central issue in the instant case is whether the PUC may independently adjust its intrastate rate basis or is preempted from so doing by FCC orders governing the separations process. In *Hawaiian Telephone Co.*, the Hawaii Supreme Court squarely confronted and decided this issue. The court stated: "We have examined the claim that the State agencies invaded a federally preempted area by varying a jurisdictional separation approved by the FCC, but find the claim to be without merit." 689 P.2d at 741. Thus, the two rate increase requests, one pursued in state court and one subsequently raised in federal court, raise the same legal issue: Did the PUC invade a federally preempted area in setting its intrastate rates? The state court found that it did not, because it neither "varied a formula, method of procedure decreed by the federal agency nor tampered with interstate rates in any way." *Id.* at 751.

In this suit, HawTel seeks to relitigate the propriety of that conclusion as to PUC's intrastate rate-making procedures. In the period between the first and second suit, there has been no "subsequent modification of the *significant facts*," *Sunnen*, 333 U.S. at 591 (emphasis added). That the transition period had expired and that the two suits involved different rate periods are not significant changes for the determination of whether or not the state's authority to set intrastate rates, after following the prescribed separations procedures, is preempted under the federal statute. Collateral estoppel should therefore bar HawTel's attempt to relitigate in federal court the very issue decided against it by the Supreme Court of Hawaii. To decide otherwise is not only to commit the resources of this court to redundant litigation; it is also a contravention of those principles of comity which underlie the federal system.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII

CIVIL NO. 84-1306

HAWAIIAN TELEPHONE COMPANY, A Hawaii Corporation,
Plaintiff,

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF HAWAII; ALBERT TOM, Chairman; SUNAO KIDO, Commissioner; and CLYDE S. DUPONT, Commissioner,
Defendants.

Filed March 13, 1985

DECISION GRANTING PERMANENT INJUNCTION

This matter came on for trial on March 12, 1985, on the plaintiff's complaint for a permanent injunction. An earlier hearing on December 17, 1984, on a preliminary injunction resulted in an Order Granting Preliminary Injunction filed herein on January 8, 1985, following a Decision rendered on December 26, 1984.

The evidence adduced at the hearing on a permanent injunction was essentially the same as at the hearing on a preliminary injunction. Some cross-examination of Carl D. Zaretki and some testimony by Leroy Yuen were added to the earlier record. An order by the Public Utilities Commission following this court's Order of January 8, 1985, was received.

I re-adopt the statements, findings of fact, and conclusions of law set forth in my Decision of December 26, 1984, and Order of January 8, 1985.

Some further reaction to the Public Utilities Commission's argument that the Commission did not violate the FCC Report and Order in Docket No. 21263 is required.

Leroy Yuen testified that separations calculations in PUC Docket No. 4588 were made according to the federally-mandated Ozark Plan and that calculations according to Hawaiian Plan II were never made (and have not yet been made) in that docket. Therefore, the PUC argues, the 1.1% "adjustment" that was made in PUC Docket No. 4588 cannot be said to have been derived solely from a comparison between the Ozark Plan and Hawaiian Plan II, as held by this court in connection with the hearing on a preliminary injunction herein. Thus any complaint as to PUC Decision and Order No. 8042 in PUC Docket No. 4588 cannot be said to involve a violation of FCC Report and Order in Docket No. 21263.

It is true that no new separations calculations based on Hawaiian Plan II were made in connection with PUC Docket No. 4588. However, the 1.1% "adjustment" made in PUC Docket No. 4588 was carried over from PUC Docket No. 4306 in which such a comparison was made. In Exhibit No. 1 to PUC Docket No. 4306, the 1.1% difference in Return on Rate Base between the results obtained under the Ozark Plan (4.0%) and the results obtained under Hawaiian Plan II (5.1%) is developed explicitly. Exhibit No. 8 to PUC Docket No. 4306 then shows an "Adjustment for Change in Separation Plan" calculated as 111.1% of Interstate Rate Base = .011 x 454,129 = $4,995" by which amount the "Increase In Net Operating Income Required" is additionally reduced.

This 1.1% from PUC Docket NO. 4306 was carried over to PUC Docket No. 4588, although without identifying the item as an "Adjustment for Change in Separation Plan". Instead the PUC stated, at page 14 of its Decision and Order No. 8042, that at 1.1% adjustment having already

been found to be fair and reasonable in PUC Docket No. 4306, would be applied again in PUC Docket NO. 4588.

PUC Docket NO. 4588 immediately succeeded PUC Docket NO. 4306. No separate basis for reaching an "adjustment" of 1.1% in PUC Docket No. 4588 is given other than the calculations set forth in Exhibit No. 1 to PUC Docket No. 4306.

I adhere to my conclusions on the preliminary injunction.

The preliminary injunction heretofore granted will be made permanent.

The foregoing constitute the court's Findings of Fact and Conclusions of Law.

DATED: Honolulu, Hawaii, March 13, 1985.

/s/Samuel P. King
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII

CIVIL NO. 84-1306

HAWAIIAN TELEPHONE COMPANY, A Hawaii Corporation,
Plaintiff,

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF HAWAII; ALBERT TOM, Chairman; SUNAO KIDO, Commissioner; and CLYDE S. DUPONT, Commissioner,
Defendants.

Filed January 8, 1985

ORDER GRANTING PRELIMINARY INJUNCTION

This matter has come before the Court on Plaintiff's Motion for Preliminary Injunction. Pursuant to notice, a hearing on the Motion was held on December 17, 1984. The Court has considered the affidavits of the parties, evidence submitted at hearing, and the pleadings and arguments of counsel. In accordance with its Decision herein, rendered on December 26, 1984, the Court finds as follows:

1. By Report and Order adopted June 29, 1981 and released July 8, 1981 in Docket No. 21263 (Report and Order 81-312), the Federal Communications Commission ("FCC") ordered that the federal Separations Manual (based on what is referred to as the "Ozark Plan") "shall apply to Hawaii."

2. Plaintiff HAWAIIAN TELEPHONE COMPANY ("HTC") has moved for a Preliminary Injunction against defendants PUBLIC UTILITIES COMMISSION and the

PUBLIC UTILITIES COMMISSIONERS (collectively "PUC" herein) under 47 U.S.C. §401(b), which reads in part:

> If any person fails or neglects to obey any order of the [Federal Communications] Commission . . . any party injured thereby . . . may apply to the appropriate district court of the United States for the enforcement of such order. If, after hearing, that court determines that the order was regularly made and duly served, and that the person is in disobedience of the same, the court shall enforce obedience to such order by a writ of injunction or other proper process, mandatory or otherwise . . . .

3. The above-referenced FCC Report and Order in Docket No. 21263 is an "order" which was "regularly made" and the PUC is a "person," all within the meaning of those words as used in 47 U.S.C. §401(b).

4. The June 29, 1981 FCC Report and Order in Docket No. 21263 referenced above is applicable to and binding upon the PUC for purposes of jurisdictional separations procedures in setting intrastate rates.

5. In its August 14, 1984 Decision and Order No. 8042 in Docket No. 4588, the PUC established intrastate telephone rates for HTC's regulated services.

6. The PUC in Decision and Order No. 8042 made an adjustment to HTC's revenue requirement, based on a 1.1% computational factor, which resulted in a reduction of $10,507,000 in the rate increase granted to Plaintiff. Said adjustment is shown on Exhibit 4 to the Decision and Order.

7. The PUC denies that, in making its adjustment, it failed to apply the Ozark Plan as required by FCC Report and Order 81-312. The PUC states in Decision and Order No. 8042:

. . . . The Commission . . . did not shift intrastate expenses to interstate and the Commission did not adopt Hawaiian Plan II as the basis for separations. . . . The Commission made an *appropriate adjustment* to provide reciprocal benefits to the ratepayers as a result of the State of Hawaii's, and in turn the ratepayers' support of the transitional agreement between HTC and AT&T. In making the appropriate adjustment the Commission merely took the difference in rates of return between Hawaiian Plan II and the Ozark Plan *as a basis of measurement* and applied the percentage difference to HTC's intrastate rate base. In so doing the annual cost or dollar return became a reduction in a cost or expense item in the determination of revenue requirements. We must emphasize again that the Commission made an "appropriate adjustment" and made no shift in expenses from intrastate to interstate . . . .

8. The transitional agreement referred to above was between HTC and AT&T and was supported by the State of Hawaii through its Governor. The agreement resulted in a transitional supplement payable to HTC by AT&T, as described in Decision and Order No. 8042:

The origin of the transitional supplement issue begins with the FCC decision in [FCC] Docket No. 21263, the purpose of which was to determine whether, and how Hawaii-Mainland telephone rates could be integrated into the nationwide toll rate structure without unduly burdening Hawaii intrastate ratepayers. Previous to the FCC decisions, the Hawaii-Mainland calls were approximately three times the rates for calls of corresponding distances on the mainland. Revenues from Hawaii-Mainland calls were split in approximate correspondence to the costs incurred

by HTC and AT&T. With the proposed integration, the reduction of two-thirds in rates and an immediate imposition of the mainland separations/settlements procedure would result in a severe contraction of revenues to HTC and a consequent increase in revenue burden for HTC intrastate subscribers.

In view of the potential impact, both HTC and the State Government sought some modification of the separations formula so that the rate integration would not burden HTC's intrastate ratepayers. Both parties stressed the unique characteristics of Hawaiian service and argued for modification to the nationwide separations plan which would shift somewhat more revenue responsibility from the intrastate to the interstate jurisdiction.

As a result, a joint agreement between HTC and AT&T proposed that the 1971 NARUC-FCC *Separations Manual* would be applied, unadjusted, to HTC's operations for purposes of jurisdictional separations. Revenue settlements, however, would be based on the conventional separations/settlements procedure plus a transitional supplement payment reflecting differing splits each year in the growth in revenue since the base year 1979. Finally, the agreement deferred the final step of rate integration until January 1, 1985.

. . . .

In *In Re Hawaiian Telephone Company,* Decision and Order No. 74312, Docket No. 4306 (January 1983) we stated that:

> Though the Commission has conceded . . . *that it cannot utilize the transitional supplement revenues as intrastate revenues,* we

> find that it would be totally unjust and unreasonable if HTC after obtaining the benefit of the transitional revenues were *also* to receive the benefit of the lowered intrastate return—the difference between Hawaiian Plan II and the Ozark Separation formulas. To award HTC another 1.1% increase in their return would deprive the ratepayers of any reciprocal benefits resulting from their support of the transitional Agreement. We conclude, as shown in the subject entitled "Revenue Increase Authorized" herein that an *appropriate adjustment* in the expenses and rate base must be made to insure that rates to be set are "just and reasonable." (Emphasis added.)

9. Notwithstanding the PUC's disclaimer of any such action, the PUC's action had the effect of applying Hawaiian Plan II (a different separations method) instead of the Ozark Plan as a basis for separations. The so-called "appropriate adjustment" made by the PUC in Docket No. 4588 was calculated solely and precisely on the difference between Hawaiian Plan II and the Ozark Separations formulas.

10. Because the PUC's 1.1% "appropriate adjustment" in Docket NO. 4588 was directly the product of applying Hawaiian Plan II for purposes of separations, the PUC thereby failed and neglected to obey FCC Order 81-312, which required the application of the federal Separations Manual.

11. The declared purpose behind the PUC adjustment is to have Hawaii intrastate ratepayers share in the transitional supplement received by HTC under the HTC-AT&T agreement approved by the FCC in 1981. Yet presumably Hawaii intrastate ratepayers have received some benefit from that agreement by a slowing down of increases in

intrastate rates. Furthermore, that agreement, and supplements under the agreement, terminate on December 31, 1984. The rates set in PUC Docket No. 4588, however, remain in place indefinitely until modified in another future proceeding before the PUC.

12. There may well be other matters besides the results obtained through the application of separations formulas which a public utilities commission may consider in rate determinations. Here, however, the PUC has not articulated any reason for its action other than the existence of the transitional supplement, which the PUC specifically held in its Docket No. 4588 decision could not be considered to be intrastate revenue.

13. Res judicata does not bar the present action; PUC Docket No. 4588 is a different application from the earlier PUC Docket No. 4306, which was appealed to and affirmed by the Supreme Court of Hawaii on September 10, 1984.

14. The Johnson Act, 28 U.S.C. §1342, by its own terms applies only when jurisdiction is founded *solely* on diversity of citizenship or repugnance to the Federal Constitution. Here, HTC's claim arises under 47 U.S.C. § 401(b).

15. The Eleventh Amendment does not bar injunctive relief against actions by State officials that contravene federal statutes or the Federal Constitution.

16. The federal statutory remedy provided by 47 U.S.C. §401(b), if available in other respects, is not defeated by the existence of an adequate state judicial remedy.

17. The present Motion for Preliminary Injunction does not involve the Civil Rights Act, 42 U.S.C. §1983.

NOW, THEREFORE, IT IS HEREBY ORDERED THAT:

1. Plaintiff's Motion for Preliminary Injunction is granted;

2. Defendants are hereby enjoined from failing and neglecting to obey FCC Order 81-312, adopted in Docket No. 21263 on June 290, 1981, released July 8, 1981;

3. Within 10 days of the date of this Order, the PUC shall place in effect schedules of intrastate rates for HTC sufficient to generate additional revenues of $101,507,000 based on the test year employed by the PUC in Docket No. 4588;

4. All additional revenues collected by HTC as a result of this Order shall be subject to refund with interest calculated pursuant to Hawaii Revised Statutes §269-16(c) if HTC does not prevail on the merits of this case;

5. The Preliminary Injunction here ordered shall remain in full force and effect pending final determination of this case and until further Order of this Court.

6. This Order shall be served upon each of the Defendants and the Intervenor, the CONSUMER ADVOCATE.

DATED: Honolulu, Hawaii, January 8, 1985.

/s/Samuel P. King
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII

CIVIL NO. 84-1306

HAWAIIAN TELEPHONE COMPANY, a Hawaii corporation,
Plaintiff,

v.

PUBLIC UTILITIES COMMISSION OF THE STATE OF HAWAII; et al.
Defendants,

and

CONSUMER ADVOCATE, the Director of the Department of Commerce and Consumer Affairs, State of Hawaii,
Applicant for Intervention.

Filed December 21, 1984

ORDER GRANTING CONSUMER ADVOCATE'S MOTION TO INTERVENE AS DEFENDANT

Applicant for Intervention the Consumer Advocate's Motion to Intervene as Defendant was heard before Magistrate Bert S. Tokairin on Monday, November 26, at 3:00 o'clock p.m., 1984. Having considered the affidavits, pleadings and argument of counsel, this Court finds:

1. The Consumer Advocate has the responsibility to represent, protect and advance the interests of consumers of utility services in the State of Hawaii.

2. The Consumer Advocate's duties and interests are separate and distinct from those of the Hawaii Public Utilities Commission.

3. Unless the Consumer Advocate is allowed to intervene in this action, the disposition of the action may impair and impede his ability to protect those interests, which may not be adequately represented by existing parties.

4. The Consumer Advocate was a party to the Public Utilities Commission's Docket Nos. 4306 (and the subsequent appellate proceedings in Hawaii Supreme Court Docket No. 9343) and 4588.

5. The Consumer Advocate agreed that it will cooperate with Plaintiff so that this matter may be resolved as expeditiously as possible.

6. The Consumer Advocate has met the criteria for intervention in accordance with Rule 24 of the Federal Rules of Civil Procedure.

NOW, THEREFORE, IT IS HEREBY ORDERED THAT:

1. Applicant the Consumer Advocate's Motion to Intervene as Defendant is granted;

2. This Order shall be served upon the parties.

DATED: Honolulu, Hawaii, DEC 21, 1984.

/s/BERT S. TOKAIRIN
MAGISTRATE BERT S. TOKAIRIN

APPROVED AS TO FORM:

/s/THOMAS W. WILLIAMS
THOMAS W. WILLIAMS, JR.
Attorney for Plaintiff

ORDER GRANTING CONSUMER ADVOCATE'S MOTION TO INTERVENE AS DEFENDANT, *Hawaiian Telephone Company vs. Public Utilities Commission, et al.*, Civil No. 84-1306 (U.S.D.C.-Haw.)

APPENDIX E

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF HAWAII

DOCKET NO. 4588

In the Matter of the Application of

HAWAIIAN TELEPHONE COMPANY

For Approval of Rate Increases and Revised Rate Schedules.

ORDER NO. 8168

Filed November 15, 1984
At 1:15 o'clock P.M.

/s/BERTHA F. KUROSAWA
Chief Clerk of the Commission

ORDER GRANTING MOTION FOR RECONSIDERATION IN PART AND DENYING MOTION FOR RECONSIDERATION IN PART

A Motion for Reconsideration was filed by Hawaiian Telephone Company on August 24, 1984, requesting the Commission to reconsider Decision and Order No. 8042 filed in the above entitled proceeding on August 14, 1984, concerning the following matters:

1. The adjustment made by the Commission to provide reciprocal benefits to the ratepayers.
2. Implementation of a phased increase effective January 1, 1985 to permit restoration of

$10,507,000 adjustment which provides reciprocal benefits.

3. The restoration of $36,410 for foreign translation expenses.

4. The treatment of the General Services and Licenses Expenses.

5. The capital carrying costs of $1,036,000 used in the reduction of HTC's total revenue requirements.

6. The disallowance of $1,901,200 in management salaries for HTC's total company operations.

7. The disallowance of premium increases for employee insurance.

8. The 14% equity cost in arriving at a 11.25% rate of return.

The Commission upon careful consideration of the grounds stated in the Motion for Reconsideration and being fully advised in the premises, finds that two items presented in its Motion have merit and our Decision and Order No. 8042 should be amended accordingly. On the remaining matters presented in the Motion, we find no new grounds that were not already considered in the issuance of Decision and Order No. 8042.

Upon due consideration of the Motion and the record in this docket, the Commission finds, *in seriatim*, as follows:

1. We find no new grounds, points or authorities in the request to restore to the $10,507,000 adjustment made in our decision not already considered in Decision and Order No. 8042.

In its Motion, HTC erroneously alleged that Hawaiian Plan II was used in place of the Ozark Plan, the separation

plan approved by the Federal Communications Commission (FCC herein), and that the intrastate costs were arbitrarily adjusted.

On the issue of the transitional supplement we stated on pages 11-12 of Decision and Order No. 8042 the following:

> "In *In Re Hawaiian Telephone Company*, Decision and Order No. 7412, Docket No. 4306 (January, 1983) we stated that:
>
> 'Though *The Commission has conceded above that it cannot utilize the transitional supplement revenues as intrastate revenues*, we find that it would be totally unjust and unreasonable, if HTC after obtaining the benefit of the transitional revenues were *also* to receive the benefit of the lowered intrastate return—the difference between Hawaiian Plan II and the Ozark Separation formulas. To award HTC another 1.1% increase in their return would deprive the ratepayers of any reciprocal benefits resulting from their support of the transitional Agreement. We conclude, as shown in the subject entitled 'Revenue Increase Authorized' herein that an *appropriate adjustment* in the expenses and rate base must be made to insure that rates to be set are 'just and reasonable.'
>
> *We hereby reaffirm our decision that the transitional supplement revenues cannot be treated as intrastate revenues. Consequently, the CA's recommendation to treat the transitional supplement as intrastate revenues must be denied.*
>
> In this proceeding, we believe that some of the parties harbor a misunderstanding of the intent of the Commission's decision in Docket No. 4306 on the issue of transitional supplement. *The Com-*

mission, in that decision, did not shift intrastate expenses to interstate and the Commission did not adopt Hawaiian Plan II as the basis for separation. As stated in our Decision and Order No. 7412, the Commission made an appropriate adjustment to provide reciprocal benefits to the ratepayers as a result of the State of Hawaii's, and in turn the ratepayers' support of the transitional agreement between HTC and AT&T. In making the appropriate adjustment the Commission merely took the difference in rates of return between Hawaiian Plan II and the Ozark Plan *as a basis of measurement* and applied the percentage difference to HTC's intrastate rate base. In so doing the annual cost or dollar return became a reduction in a cost or expense item in the determination of revenue requirements. We must emphasize again that the Commission made an 'appropriate adjustment' and made no shift in expenses from intrastate to interstate. The Commission in Decision and Order No. 7412 adhered to jurisdictional separations when we stated that:

For purposes of this proceeding, the *Commission finds that jurisdictional separations are required by law and that the procedures specified by the Ozark Plan as proposed by the Company are reasonable.*" (Emphasis added.)

We further stated on pages 14-15 that:

"In Docket No. 4306 this Commission made an adjustment by reducing the amount of the revenue increase by 1.1% on the intrastate rate base so that the intrastate rates would be just and reasonable. We find no reason to deviate from our previous decision.

We again emphasize the fact that by making such an adjustment, *we are not substituting the*

Hawaiian Plan II for the Ozark Plan for rate-making purposes. As we have indicated herein, the method of separating interstate and intrastate operations is based upon the Oazark Plan.

Further, though we have utilized the Ozark Plan and recognize that the FCC has jurisdiction over HTC's interstate operations *this Commission is not precluded from making any present and future adjustments to HTC's intrastate results of operations in order to balance the interest of the ratepayers and HTC to fulfill our responsibility to fix 'just and reasonable' rates.*" (Emphasis added.)

Our decision in the past HTC rate case on this issue and in this decision clearly indicates that the Ozark Plan was used to allocate interstate and intrastate costs. The Commission recognized that the costs would be incurred during the test year and arrived at an intrastate revenue requirement necessary to produce a fair rate of return found reasonable. After the total intrastate revenue requirement was determined the Commission then made an appropriate intrastate adjustment based upon the precedent and principle first enunciated in Docket No. 4306.

HTC appealed the transitional supplement issue in Docket No. 4306 to the Hawaii Supreme Court and the Court issued its opinion on this issue in September, 1984. See *In Re Hawaiian Telephone Company,* Sup. Ct. No. 9343, filed September 27, 1984. The Hawaii Supreme Court held on the issue of transitional supplement, the following (pp. 18-20):

"The foregoing conclusion that the rate order was just and reasonable in total effect would normally end our inquiry. Hawaiian Telephone, however, avers the decision under review is flawed in yet another respect; it alleges the Commission erred 'by making an unsupported and unlawful

'Separation Adjustment.' *We have examined the claim that the State agency invaded a federally preempted area by varying a jurisdictional separation approved by the FCC, but find the claim to be without merit.*"

. . . .

"The Commission, of course, may not interfere with federal regulation of interstate telecommunications services; the Supremacy Clause does not countenance rulings by a state ratemaking agency that 'may produce a result inconsistent with the objective of the federal [regulatory] statute.' *Maryland v. Louisiana,* 451 U.S. 1725, 747 (1981) quoting *Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 230 (1947)). Thus for example, a state agency may not adopt for its ratemaking purposes a depreciation formula incompatible with the depreciation method decreased for such purposes by the FCC though a preemption order. *See New England Telephone & Telegraph Co. v. Public Utilities Commission of Maine,* 570 F. Supp. 1558 (1983).

Here, the Commission neither varied a formula, method, or procedure decreed by the federal agency nor tampered with interstate rates in any way. It expressly rejected the Consumer Advocate's thesis that the circumstances surrounding the approval of 'transitional supplements' by the FCC rendered it appropriate for those receipts to be considered as intrastate revenue, recognizing that '[t]he use of interstate revenues to satisfy intrastate revenue requirements would violate the fundamental principles of jurisdictional separations.' P.U.C. Order and Decision No. 7412, at 22." (Emphasis added.)

The Commission submits that the Hawaii Supreme Court holding on the subject of transitional supplement is dispositive of this issue in this reconsideration proceeding.

2. We find no new grounds, points or authorities to approve the implementation of a phased rate increase to permit the restoration of the $10,507,000 effective January 1, 1985.

On this issue, we stated in Decision and Order No. 8042, page 13, that:

> "Although HTC claimed that the rates to be approved in this docket will be sometime in 1984 and 1985 [and] will be the first full year it purportedly will have an opportunity to earn an authorized return, *HTC provided no evidence on what its results of operations would be for 1984 and 1985. HTC assumed that the revenues, expenses, expenditures and conditions with the exception of the transitional supplement would remain status quo.*
>
> We also note that HTC makes no distinction between an actual and normalized year used in the ratemaking process. Further, 1983 is the test year and all revenues, expenses and similar items based upon a representative year are used in setting rates for the future. Accordingly, we reject HTC's position with respect to the mootness of the benefits resulting from the agreement between HTC and AT&T." (Emphasis added.)

3. We find no new grounds to restore the $36,410 ($55,000 x 66.2%) of intrastate foreign currency translation expenses which were disallowed in Decision and Order No. 8042.

The NARUC-FCC Separations Manual[1] specifically states that:

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[1] Section 1, General, Part 1, Subsection 11.18.

"11.18 The separations procedures described in this manual are not to be interpreted as indicating what property, revenues, expenses and taxes, or what items carried on the income, reserve and retained earnings accounts, should or should not be considered in any investigation or rate proceeding."

Since our decision disallowed any foreign currency translation expenses for intrastate operations, we find that there will be no difference in the intrastate results of operations by excluding the total company expenses of $55,000 *before* the separation of $55,000 or the intrastate reduction of $36,410 after the separation of these translation expenses.

The inclusion of the $55,000 in total company expenses and the separation of 33.8% (100% - 66.2%) to interstate yields a residual of $36,410 of foreign currency translation expenses to the intrastate operations. The disallowance of the expenses by either method would reduce intrastate expenses by $36,410. The end result remains the same. Intrastate expenses are $45,410 lower.

4. We also find no new grounds, points or authorities, not already considered in arriving at the test year General Services and License expenses of $2,722,000.

We find that the General Services and License expenses are reasonable and that no further amplification of our decision is necessary.

5. With respect to the capital carrying costs of $1,036,000 as a credit to reduce HTC's intrastate expenses, we find that in our calculations on this matter, a corresponding adjustment of $612,000 was not made to the revenues under present rates. By not making an offsetting adjustment to revenue under present rates, the amount of the increase awarded in Decision and Order No.

8042 was understated by $612,000 excluding revenue taxes. We conclude that the error in calculation was inadvertent and the amount should be restored.

We note also in review of the capital carrying costs, that the intrastate depreciation expenses for the test year was overstated by $99,000.

6. After careful review of HTC's request that we reconsider the disallowance of $1,901,200 in total company management salaries, we find from a review of the record that the disallowance should have been $950,000 for total company rather than the $1,901,200 that was used. With the allocation to HTC's non-regulated operation and after separation, the intrastate disallowance amount is $608,000 instead of the $1,217,000 disallowed amount stated in Decision and Order No. 8042.

With respect to HTC's request that the Commission reconsider its "punitive action" of disallowing the requested management increase in salaries, we find no new grounds, points or authorities not already considered in our decision.

Accordingly, we find that HTC's request to reconsider the disallowance of the management salary increases must be denied.

7. We find no new grounds, points or authorities to amend our decision on premium increases for employee insurance.

We stated in Decision and Order No. 8042 that:

> "The Commission in accepting the CA's estimate as being more reasonable is not implying that it is mandating the CA's approach. We point out only that *cost containment is required* and it is in management's discretion and prerogative as to how this should be accomplished." (Emphasis added.)

8. We also find no new grounds, points or authorities, not already considered in our decision on the cost of equity.

With respect to HTC's reference to Maui Electric Company, Ltd. the record is void of any comparison between the operations and financial conditions of Maui Electric and HTC.

9. We find that HTC's request to phrase the last sentence of the ordering paragraph in Decision and Order NO. 8042 to: "The first report shall be filed on January 31, 1985, and successive reports filed thereafter within 30 days of the end of each quarter in 1985" as being reasonable.

REVISED RESULTS OF OPERATIONS

We have concluded under Items 5 and 6 above, that certain adjustments to HTC's results of operations after allocation to HTV's non-regulated operations and after separation are in order and these adjustments are shown in Exhibit 3, as amended, attached hereto and made a part hereof.

As a result of the adjustments to be made, the uncollectibles, gross revenue and income taxes were also recomputed.

The end result is that the gross revenue increase, should have been $32,009,000 instead of $30,840,000.

Exhibit 4, as amended, also shows that the intrastate adjustment to provide reciprocal benefits should have been $10,507,000 shown in Exhibit 4, Decision and Order No. 8042.

FURTHER INCREASE

Finally, Exhibit 5 attached hereto and made a part hereof shows that a further increase of $1,169,000 over and

above $90,543,000 is necessary to provide for an 11.25% intrastate return on rate base.

Accordingly, we find that said $1,169,000 increase is necessary, just and reasonable.

NEW RATES

In Decision and Order No. 8042 we found that an increase of $9,543,000 to the service connection or non-recurring activities reasonable. We also ordered HTC to file new permanent rates to reflect the additional $9,543,000.

The Commission after reconsidering its Decision and Order No. 8042 finds that a further increase of $1,169,000 is justified for the reasons discussed herein above. As stated in Decision and Order No. 8042 ". . .fairness dictates that the non-recurring activities charges or station connection charges* should be borne by those who cause such non-recurring costs by HTC each year. . . ." We then concluded that $7,598,900 of the $9,543,000[1] increase should be imposed on station connection activities.

By Decision and Order No. 8052 dated August 23, 1984, we approved revised rates to reflect the increases authorized in Decision and Order No. 8042. Upon review of the rates previously authorized and the record in this proceeding, we find that the added increase herein granted should be imposed upon non-recurring station connection activities.

The record indicates that HTC originally requested an increase of $17,633,000 in the non-recurring station connection activities. This increase was based upon the recovery of HTC's costs from the cost causer. In our Interim

* Used in the same context as HTC's non-recurring activities charges which include such activities as moves and changes.

[1] The balance of the $1,944,000 increase are revenues from new intrastate charges.

Decision and Order No. 7855, we granted an increase of $653,000 for station connection activities. Another increase of $7,958,900 for the same activities was granted in Decision and Order No. 8042. Together the total increase authorized amounted to $8,611,900 which is far less than the $17,633,000 requested by HTC to cover the costs of non-recurring activities. Thus, we find that the further increase granted herein should be imposed upon the non-recurring station connection activities.

In reviewing the rates we approved for the non-recurring activities, we note that the majority of the increases were imposed upon Tiers I through III of the station connection tariffs. The charge for Tier IV received relatively insignificant increases while the charges in Tier V in many cases received no increase.

The record indicates that a comparison between HTC's cost of service for Tiers IV and V station connection activities and the rates for the same activities show a wide discrepancy between rates and costs. For Tier I, Tier II and Tier III, the rates and the cost-to-serve are significantly closer than Tiers IV and V.

Accordingly, we find that the further increase of $1,169,000 should be imposed upon Tier IV, Premise Wiring Charges, and Tier V, Station Handling Charges in the Station Connection Move and Change Charges. We find these changes to be reasonable.

IT IS THEREFORE ORDERED THAT:

1. HTC shall submit to the Commission within seven days, for our approval, revised rate schedules reflecting a further increase of $1,169,000 in accordance with the findings made herein and as shown in Exhibit 5 attached hereto.

2. Exhibits 3 and 4 attached to Decision and Order No. 8042 be deleted and Amended Exhibits 3 and 4 attached hereto be substituted therefore.

3. The last sentence in the ordering paragraph be phrased as follows: "The first report shall be filed on January 31, 1985, and successive reports filed thereafter within 30 days of the end of each quarter in 1985".

4. All other matters, in Decision and Order No. 8042 except the foregoing, shall remain in full force and effect.

DONE at Honolulu, Hawaii, this 15th day of November, 1984.

PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII
By /s/ALBERT TOM
Albert Tom, Chairman

By /s/SUNAO KIDO
Sunlao Kido, Commissioner

APPROVED AS TO FORM:
/s/HARRY S.Y. KIM
HARRY S. Y. KIM
Commission Counsel

HAWAIIAN TELEPHONE COMPANY
REVISED
RESULTS OF OPERATIONS UNDER EXISTING RATES AND AT 11.25% RETURN
($000's)

	Results Under Existing Rates	Increase Without Appropriate Adjustment	Results At 11.25% Return
Revenues:			
Gross Revenues	$215,968	$332,009	$247,977
Uncollectibles	(1,014)	(304)	1,318
Net Revenues	$214,954	$31,705	$246,658
Expenses:			
Maintenance	$ 53,933		$ 51,271
Traffic	5,675		5,503
Commercial	14,021		14,021
Marketing	2,624		2,624
Advertising	701		701
General Office Salaries & Expenses	13,665		13,665
Insurance & Damages	252		252
Operating Rents	2,578		2,578
Relief & Pensions	11,338		11,338
General Services & Licenses	1,512		1,512
Expenses Charged Constr.	(2,689)		(2,689)
Wage Normalization	1,066		1,066
Other Expenses	400		400
Depreciation & Amortization Expense	51,835		51,835

[Exhibit 3 As Amended continued on next page]

	Results Under Existing Rates	Increase Without Appropriate Adjustment	Results At 11.25% Return
Business Information Systems	(200)		(200)
Supply & Transportation	(1,641)		(1,641)
Management Wage Adjustment	(609)		(1,217)
Relocation Expenses	(131)		(131)
Customer Deposits	(79)		(79)
Accrued Vacation Expenses	(577)		(577)
Depreciation To Clearing	39		39
Capital Carrying Costs	(727)		(727)
Operating Taxes	17,444		22,376
Total Operating Expenses	$170,430		$172,019
Operating Income Before Income Taxes	$ 44,524		$ 74,088
Income Taxes	$ 9,594		$ 24,159
Net Operating Income	$ 34,930		$ 49,929
Rate Base	$443,813		$443,813
Return On Rate Base	7.87%		11.25%

EXHIBIT 3 AS AMENDED

HAWAIIAN TELEPHONE COMPANY
REVISED
INTRASTATE REVENUE INCREASE WITH APPROPRIATE ADJUSTMENT BASED ON 1983 TEST YEAR

	$000's
Increase Necessary To Produce An 11.25% Return On Rate Base	$32,009
Less: Appropriate Adjustment As Discussed, *Supra*, Under Transitional Supplement	$10,507[1]
Total Revenue Increase Authorized	$21,502
Less: Interim Increase Granted Per Decision and Order No. 7855	10,790
Additional Increase	$10,712

EXHIBIT 4 AS AMENDED

[1] Rate Base x % Appropriate Adjustment Factor ÷ Interstate Gross Revenue Factor = $443,813 x .011 ÷ .46463 = $10,507

HAWAIIAN TELEPHONE COMPANY
FURTHER INCREASE AFTER CONSIDERATION OF HTC's MOTION FOR RECONSIDERATION

	$000's
Revised Additional Increase Per Exhibit No. 4 as amended	$10,712
Additional Increase Granted Per Decision and Order No. 8042	9,543
Further Increase necessary to produce 11.25% return	$ 1,169

EXHIBIT 5

APPENDIX F

In the Mater of the Application of HAWAIIAN TELEPHONE COMPANY For Approval of Intrastate Rate Increases and Revised Rate Schedules

NO. 9343

APPEAL FROM PUBLIC UTILITIES COMMISSION STATE OF HAWAII

(DOCKET NO. 4306)

SEPTEMBER 27, 1984

LUM, CJ., NAKAMURA, PADGETT, HAYASHI AND WAKATSUKI, JJ.

PUBLIC UTILITIES—*public service commissions or boards—judicial review or intervention—appeal from orders of commission—review and determination in general.*

The enforcement of text-book orthodoxy in the rate-making process is not a function of this court under Hawaii Revised Statutes (HRS) Chapters 269 and 91.

APPEAL AND ERROR—*review—scope and extent in general—matters or evidence considered in determining question—consideration of other cases and matters therein.*

It is not the practice of this court to decide important questions of law by dicta from unrelated cases.

PUBLIC UTILITIES—*public service commissions or boards—in general—powers and functions in general.*

SAME—*same—judicial review or intervention—appeal from orders of commission—review and determination in general.*

The general supervision over all public utilities has been delegated to the Public Utilities Commission. It is

the Commission that is authorized to fix "just and reasonable" rates to be charged by public utilities, and a reviewing court is not empowered to examine a rate case *de novo*.

PUBLIC UTILITIES—*public service commissions or boards—judicial review or intervention—appeal from orders of commission—review and determinations in general.*

This court's function in rate making is a limited one circumscribed by the provisions of HRS § 91-14(g).

SAME—*regulations—regulation of charges—reasonableness of charges in general.*

Whether utility rates set by the Public Utilities Commission are "just and reasonable" is by no means dependent on the procedure followed by the Commission in deciding what rate would be fair in the circumstances. Under the statutory standard of "just and reasonable" it is the result reached not the method employed which is controlling.

SAME—*same—same—same.*

SAME—public service commissions or boards—judicial review or intervention—appeal from orders of commission—review and determination in general.

It is not theory but the impact of the rate orders which counts. If the total effect of the rate order cannot be said to be unjust and unreasonable, judicial inquiry is at an end. The fact that the method employed to reach that result may contain infirmities is not then important.

PUBLIC UTILITIES—*regulation—regulation of charges—reasonableness of charges in general.*

The reasonableness of utility rates is not determined by a fixed formula but is a fact question requiring the exercise of sound discretion by the Public Utilities Commission.

SAME—*same—same—nature and extent in general.*

The rate-making function involves the making of pragmatic adjustments, and there is a "zone of reasonableness" within which the Public Utilities Commission may exercise its judgment.

ADMINISTRATIVE LAW—*powers and proceedings of administrative agencies, officers, and agents—in general—discretion.*

When invoked as a guide, sound discretion is that exercised not arbitrarily or wilfully, but with regard to what is right and equitable under the circumstances and the law.

PUBLIC UTILITIES—*regulation—regulation of charges—reasonableness of charges in general.*

To insure that rates are "just and reasonable" includes the power to take into consideration the interest of the ratepayers as well as that of the utility owners.

SAME—*public service commissions or boards—in general—exclusive and concurrently powers.*

STATES—*political status and relations—state action invading power of the United States—exclusive or concurrent federal powers.*

Since the property of a telephone company is used in providing both intrastate and interstate telecommunications services and expenses are incurred in the joint rendition of such services, a separation of telephone property, revenues, and expenses between the intrastate and interstate operations of the company is essential to the appropriate recognition of the competent governmental authority in each field of regulation.

PUBLIC UTILITIES—*in general—constitutional and statutory provisions.*

SAME—*public service commissions or boards—in general—exclusive and concurrent powers.*

STATES—*political status and relations—invading power of the United States—exclusive or concurrent federal powers.*

The Public Utilities Commission may not interfere with federal regulation of interstate telecommunications services. The Supremacy Clause does not countenance rulings by a state rate-making agency that may produce a result inconsistent with the objective of the federal regulatory statute.

PUBLIC UTILITIES—*public service commissions or boards—in general—exclusive and concurrent powers.*

STATES—*political status and relations—state action invading power of the United States—exclusive or concurrent federal powers.*

Where the Public Utilities Commission neither varied a formula, method, or procedure decreed by a federal agency nor tampered with interstate rates in any way, it did not invade an area reserved for federal regulation.

PUBLIC UTILITIES—*regulation—regulation of charges—value of property; rate base.*

"Rate base" represents the total investment in, or fair value of, the facilities of a utility employed in providing service. While the difficulty in making an exact apportionment of the property used in providing service is apparent and only reasonable measures are essential, it is quite another matter to ignore altogether the actual uses to which the property is put in providing interstate or intrastate services.

OPINION OF THE COURT BY NAKAMURA, J.

We are asked to review a decision and order of the Public Utilities Commission allowing a rate increase for telephone and related services provided by the Hawaiian Telephone Company. The Company sought specific approval of revised intrastate rate schedules it claimed were

projected to increase intrastate revenues by approximately $47,600,000 and "produce [an] 8.5% rate of return on the average intrastate rate base for the test year 1982." After lengthy contested proceedings, the Commission approved instead rate schedules it found would increase revenues by $27,121,000 and produce a 9.18% rate of return. The Company appeals, charging the Commission erred: (1) "in failing to find a fair rate of return," (2) "in failing to provide the Company an opportunity to earn a fair return on its intrastate rate base," (3) "by making an unsupported and unlawful 'Separation Adjustment,' " and (4) "in awarding a rate increase sufficient only to produce an annual revenue increase of $27,121,000." Finding no merit in the claims of error, we affirm the decision and order.

I.

A.

After filing the required notice of an intent to seek rate increases in early June of 1981, Hawaiian Telephone submitted an application for approval and revised rate schedules in August of 1981. The revised schedules, it claimed, were structured to general increased intrastate revenues of $47,600,000, which in its estimation "represent[ed] a 25% increase."

The application came on the heels of the approval in June of 1981 by the Federal Communications Commission (FCC) of a 1980 agreement between American Telephone and Telegraph Company (AT&T) and Hawaiian Telephone purporting to represent a "resolution among the various interests involved of questions of jurisdictional separations, settlements, and rate integration for Hawaii."[1] The agree-

[1] The foregoing language is from the joint motion submitted to the FCC by AT&T and Hawaiian Telephone. The agreement itself stated it was "for revenue division (settlement) arrangements for interstate MTS [message telecommunications services] and WATS [wide area telecommunications services] to and from Hawaii."

ment was spurred by the federal agency's determination in 1972 that rates for interstate telecommunications services to and from Hawaii, which then were substantially higher than interstate rates on the mainland, should be integrated into the "U.S. Mainland domestic rate pattern" and the agency's 1976 decisions that this was to be achieved in three phases and accompanied by "cost-based settlements based on prescribed jurisdictional separations procedures."[2]

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[2] The first of the agreement's recital clauses reads as follows:

> WHEREAS, the Federal Communications Commission (FCC) has determined the public interest requires that interstate MTS and WATS rates for service to and from Hawaii be integrated into the U.S. Mainland domestic rate pattern, *Establishment of Domestic Communications-Satellite Facilities*, 35 F.C.C.2d 844 (1972); that such rate integration should be accomplished by phased reductions in three steps, *Integration of Rates and Services*, 61 F.C.C.2d 380 (1976); and that such rate integration should be accompanied by cost-based settlements based on prescribed jurisdictional separations procedures, *Integration of Rates and Services*, 61 F.C.C.2d 380 (1976), *Reconsideration*, 65 F.C.C.2d 324 (1977), *Memorandum Opinion and Order*, FCC 78-693, released September 29, 1978[.]

"Jurisdictional separations procedures" are methods by which the costs of providing services, expenses, and revenues are allocated between the federal and state jurisdictions. As a publication of the National Association of Regulatory Utility Commissioners (NARUC) explains:

> Telephone Companies are engaged in furnishing both intrastate and interstate communications services, including exchange, message toll telephone, wide area telephone, private line, and data services. The intrastate services are subject to the jurisdiction of the several state regulatory bodies, and interstate services are subject to the jurisdiction of the Federal Communications Commission. The major portion of telephone property of the companies is used in common for both intrastate and interstate services. Similarly, the major portion of the expense is incurred in the joint rendition of these services. Therefore, a uniform method of separations, acceptable to the state and federal regulatory bodies, is essential so that the property costs, revenues, expenses, taxes and reserves of each company subject to

The ordered integration was partially implemented by rate reductions in 1976, 1977, and 1979. Full integration, however, was to come after the prescription of procedures to be applied in determining "jurisdictional separations and cost-based settlements" with respect to Hawaii. Thus, a Federal-State Joint Board was convened by the FCC to examine existing procedures for possible modification to suit the situation. But before the Board submitted its recommendation, AT&T and Hawaiian Telephone agreed they would request the Board to recommend and the FCC to decree that the method of separations described in the NARUC-FCC Separations Manual (Feb. 1971 ed.), which has been incorporated in the FCC's rules, would apply.

The compact between the interstate and the intrastate carriers stipulated they would jointly seek sanction to delay full implementation of these procedures and full rate integration until 1985. The agreement also provided that cost-based settlements were to be effective from 1981 through 1984, but the local carrier was to receive "transitional supplements" during this period.[3] The agreement

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the respective jurisdictions may be determined.

NARUC-FCC Cooperative Committee on Communications, Separations Manual 5 (1971).

[3] The agreement provided in relevant part:

(2) For 1981 through 1984, the interim MTS and WATS settlement will consist of a uniform cost-based settlement, plus a transitional supplement.

> (A) The uniform cost-based MTS and WATS settlement will be based on Hawaiian interstate MTS and WATS costs determined in accordance with the existing Separations Manual or any revisions thereto prescribed by the FCC or other authorized body, and will include the uniform interstate settlement ratio. Such settlement, including underlying separations studies, and procedures for subsequent review and true-up, will be administered in accordance with procedures employed by telephone companies on the Mainland.
>
> (B) The transitional supplement will be based on a decreasing percentage of the cumulative total revenue growth from January 1,

called for parity thereafter in rates for telecommunications services to and from Hawaii and interstate rates on the mainland United States.

In accord therewith AT&T and Hawaiian Telephone moved in July of 1980 to have the Joint Board recommend the prescription of the NARUC-FCC Separations Manual for Hawaii and to have the FCC approve the agreement, asserting such actions would "avoid the need for further proceedings . . . and . . . result in implementation of full rate integration in a manner that will serve the overall public interest." Hawaiian Telephone sought the support of Hawaii's Congressional delegation and the Governor in seeking such approval. But before endorsing the carriers' pact, the Governor requested an explanation on how it would be of direct benefit to customers.[4] In responding to the pointed query, Hawaiian Telephone professed that the agreement provided a means to accomplish rate integration with minimum impact to Hawaii customers and "the accumulated cost to Hawaii and Mainland customers of delaying integration [would] be approximately $36 million compared to the $130 million in transition payments *which lessen the need for local rate increases.*" (Emphasis sup-

1980 (over 1979) in actual two-way Hawaii interstate MTS and WATS revenues, as follows:

Year	*Percent*
1981	100
1982	60
1983	35
1984	20

[4] Since Hawaiian Telephone's position before the State PUC has been that "the Company's interstate services are separate and distinct from its intrastate services, at least for rate-making purposes," the Governor sought clarification on "precisely how the users of the Company's intrastate services will directly benefit from the operation of the . . . Agreement," *See* letter from the Hon. George R. Arlyoshi to Donald M. Kuyper, President, Hawaiian Telephone Company (July 31, 1980).

plied).[5] Similar representations were made in a subsequent letter from a company vice-president to the Attorney General.[6] A formal expression of State support was transmitted thereafter to the chairman of the FCC.[7] The federal regulatory agency "accepted and approved" the agreement in July of 1981.

B.

Hawaiian Telephone submitted its application for intrastate rate increases to the Public Utilities Commission on August 25, 1981. In accord with the mandate of rule

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[5] *See* letter from Donald M. Kuyper to the Hon. George R. Ariyoshi (Aug. 13, 1980).

[6] The letter from L. K. Toole to Attorney General Tany Hong dated October 13, 1980 stated in part:

> As indicated in recent correspondence between Mr. Don Kuyper and Governor George Ariyoshi, '[w]e are obliged as a business matter to maintain an adequate overall rate of return for the Company as a whole.' The Agreement between Hawaiian and AT&T significantly lessens the need to increase local rates to fully allowable levels in order to maintain that comparable overall rate of return.
>
> It is our intent to certainly give consideration to the level of comparable overall earnings in determining the amount and timing of any application for local rate relief.

[7] The Governor's letter to the chairman of the FCC stated in part: In a filing to the FCC in September, the State of Hawaii expressed its support of this agreement with certain qualifications. I am pleased to be able to inform you that those concerns have now been resolved in a manner that is satisfactory to all parties, and that local users of telephone services in Hawaii will benefit from the agreement.

> Therefore, I urge the Joint Board and the Commission to approve the agreement between Hawaiian and AT&T as expeditiously as possible. I am confident that such action is in the best interest of the citizens of the State of Hawaii.

Letter from the Hon. George R. Ariyoshi to the Hon. Charles D. Farris (October 16, 1980).

8-3 of the Commission's Rules of Practice and Procedure, the petition was accompanied by "written direct testimony" and exhibits purportedly sustaining the requested rate increase.

The Consumer Advocate of the State of Hawaii, whose duty it is to "represent, protect, and advance the interests of consumers of utility services,"[8] however, considered the submission wanting in essential respects and quickly moved for summary disposition of the application. He argued the testimony and exhibits neither established "cost justifications" nor reflected the Company's "earnings results" on a county or divisional basis as mandated by the Commission's rules. After overruling the Advocate's motion for a finding of "insufficiency" and disposing of other preliminary matters, the Commission commenced a series of public hearings on Hawaiian Telephone's plea for rate increases.

The utility proposed across-the-board price increases amounting to approximately thirty-five percent for most of the services it rendered the public and limited changes in rates and charges for other services. The Consumer Advocate maintained throughout the contested-case hear-

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[8] HRS § 269-51 provides:

Consumer advocate: director of commerce and consumer affairs. The director of commerce and consumer affairs shall be the consumer advocate in hearings before the public utilities commission. The consumer advocate shall represent, protect, and advance the interest of consumers of utility services. The consumer advocate shall not receive any salary in addition to the salary received as director of commerce and consumer affairs.

The responsibility for advocating the interests of the consumer of utility services shall be separate and distinct from the responsibilities of the public utilities commission and those assistants employed by the commission. As consumer advocate, the director of commerce and consumer affairs shall have full rights to participate as a party in interest in all proceedings before the public utilities commission.

ings, as he had earlier, that a need for rate increases had not been demonstrated. The large sums Hawaiian Telephone became entitled to in the form of "transitional supplements" under the recently approved agreement with AT&T were among the reasons urged for disallowing rate hikes.

At one point in the protracted proceedings, the Company summarized its case through the testimony of an officer and the exhibits presented in conjunction therewith. It averred therein that "the rate relief requested [was] \$47.6 million which will produce a rate of return on the intrastate rate base [of \$485 million] of only 8.6%." (H.T.C. Exh. No. T-19, at 3-4). This estimate of necessary revenue, it explained, followed a determination "that a net operating income of \$41.7 million would be required for intrastate operations in test year 1982." (H.T.C. Exh. No. T-19, at 4). "The Commission, based on the foregoing, [deemed] it [unnecessary] to make a finding on . . . a specific fair rate of return for the test year 1982." P.U.C. Decision and Order No. 7412, at 96. And it approved new rate schedules designed to "produce an annual revenue increase of \$27,121,000" and yield the "net operating income of \$41,700,000 . . . requested by HTC." *Id.* at 113. The disparity in estimates of additional revenue likely to generate the desired net income resulted in part from a finding that "[t]he intrastate rate base for test year 1982 [was] \$454,129,000" rather than \$485,000,000 as claimed by Hawaiian Telephone. *Id.*

II.

Hawaiian Telephone argues the Commission committed reversible error when it approved rate increases calculated to "produce an annual revenue increase of \$27,121,000" and yield a "net operating income of \$41,700,000." The Commission, the Company claims, "adopted an unprecedented and unlawful method of determining the rate increase and then reduced the already inadequate award by

the unsupported and unlawful use of a so-called 'Separation Adjustment.' " The initial specification of error is that "[t]he Commission erred in failing to find a fair rate of return." But we are not convinced this was error.

A.

We are mindful, of course, that orthodoxy in public utility rate making suggests four sequential determinations should precede the ultimate rate decision; they are:

> (1) what are the enterprise's *gross utility revenues* under the rate structure examined; (2) what are its *operating expenses,* including maintenance, depreciation and all taxes, appropriately incurred to produce those gross revenues; (3) what utility property provides the service for which rates are charged and thus represents the base *(rate base)* on which a return should be earned and (4) what percentage figure *(rate of return)* should be applied to the rate base in order to establish the *return* (wages of capital) to which investors in the utility enterprise are reasonably entitled.[9]

1 A. Priest, *Principles of Public Utility Regulation* 45 (1969) (emphasis in original).

The regulatory agency in this case acknowledged it did not determine "what percentage figure *(rate of return)* should be applied to the rate base in order to establish the *return.*" *Id.* The public utility asserts the neglect was fatal. It maintains our decisions in *Honolulu Gas Co. v. Public Utilities Commission,* 33 Haw. 487 (1935), and *In*

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[9] I A. Priest, *supra,* note 1, at 45, reads as follows:

See Missouri *ex rel,* Southwestern Bell Tel. Co. v. Public Serv. Comm'n, 262 U.S 276, 290-92 (1923) (Brandeis, J., dissenting). See also City of Cleveland v. Public Util. Comm'n, 164 Ohio St. 442, 132 N.E.2d 216, 217 (1956).

re Hawaii Electric Light Co., 60 Haw. 625, 594 P.2d 612 (1979), "ma[k]e it abundantly clear that a fair rate of return finding is essential to the regulatory process," directing us to statements therein that seemingly support the thesis. Still, the enforcement of text-book orthodoxy in the rate-making process is not our function under Hawaii Revised Statutes (HRS) Chapters 269 and 91; nor is it our practice to decide important questions of law by dicta from unrelated cases. *Cf. Permian Basin Area Rate Cases*, 390 U.S. 747, 775 (1968) (the Supreme "Court does not decide important questions of law by cursory dicta inserted in unrelated cases."), *reh'g denied*, 392 U.S. 917 (1968).

Our function in rate making is a limited one. "[T]he general supervision . . . over all public utilities" has been delegated to the Public Utilities Commission. HRS § 269-6 (Supp. 1983). "It is the Commission that is authorized to fix 'just and reasonable' rates to be charged by public utilities, HRS § 269-16 (1976), and a reviewing court is not empowered to examine the case *de novo*." *In re Hawaii Electric Light Co.*, 60 Haw. at 629, 594 P.2d at 617 (citations omitted). Our role is circumscribed by the provisions of HRS § 91-14(g).[10] Section 91-14(g)(3), however,

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[10] HRS § 91-14(g) (1976) reads:

(g) Upon review of the record the court may affirm the decision of the agency or remand the case with instructions for further proceedings; or it may reverse or modify the decision and order if the substantial rights of the petitioners may have been prejudiced because the administrative findings, conclusions, decisions, or orders are:

(1) In violation of constitutional or statutory provisions; or

(2) In excess of the statutory authority or jurisdiction of the agency; or

(3) Made upon unlawful procedure; or

(4) Affected by other error of law; or

(5) Clearly erroneous in view of the reliable, probative, and sub-

expressly provides that an administrative decision and order is subject to reversal or modification if "[m]ade upon unlawful procedure." Since the claim of error here concerns the procedure employed in approving revised rate schedules for utility services, our task is to consider the challenged action in the light of pertinent procedural mandates.

B

The procedural requirements relating to rate determinations are delineated in HRS § 269-16(b). The subsection requires that changes in rate schedules be preceded by notice and commission approval.[11] And a rate increase can

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stantial evidence on the whole record; or

(6) Arbitrary, or capricious, or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

[11] In 1981 HRS § 269-16(b) read:

(b) No rate, fare, charge, classification, schedule, rule, or practice, other than one established pursuant to an automatic rate adjustment clause previously approved by the commission, shall be established, abandoned, modified, or departed from by any public utility, except after thirty days' notice to the commission and prior approval by the commission for any increases in rates, fares, or charges. The notice herein provided for shall plainly state the rate, fare, charge, classification, schedule, rule, or practice proposed to be established, abandoned, modified, or departed from and the proposed effective date thereof and shall be given by filing the notice with the commission and keeping it open for public inspection. The commission may, in its discretion and for good cause shown, allow any rate, fare, charge, classification, schedule, rule, or practice to be established, abandoned, modified, or departed from upon notice less than that provided for herein. A contested case hearing shall be held in connection with any increase in rates and such hearing shall be preceded by a public hearing at which the consumers or patrons of the public utility may present testimony to the commission concerning the increase. The public hearing shall be an advertised public hearing or hearings on the island on which the utility is situated. Notice of the advertised hearing, with the purpose thereof and the date, time, and place at which it will open, shall be advertised not

only be approved after "public hearing" at which consumers or patrons of the utility are allowed to present their views regarding the increase and "a contested case hearing." *See supra* note 11. Hawaiian Telephone does not dispute that the necessary "public hearing" and "contested case hearing" were conducted; nor does it contend the subsection expressly calls for a fair *rate* of return finding.

This aspect of the challenge of the rate order is purportedly grounded on the final portion of § 269-16(b), which

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less than once in each of three weeks in a newspaper published in and of general circulation in the State, the first publication being not less than twenty-one days before the public hearing and the last publication being not more than two days before the scheduled hearing. The applicant or applicants will notify their consumers or patrons of the proposed change in rates and of the time and place of the public hearing not less than one week before the date set, the manner and the fact of notification to be reported to the commission before the date of hearing. The commission is authorized to use such additional media as radio or television to advise the public if it finds it necessary to do so. The commission, upon notice to the public utility, may suspend the operation of all or any part of the proposed rate, fare, charge, classification, schedule, rule, or practice or any proposed abandonment or modification thereof or departure therefrom and after a hearing by order regulate, fix, and change all such rates, fares, charges, classifications, schedules, rules, and practices, so that the same shall be just and reasonable, and prohibit rebates and unreasonable discrimination between localities, or between users or consumers, under substantially similar conditions, regulate the manner in which the property of every public utility is operated with reference to the safety and accommodation of the public, prescribe its form and method of keeping accounts, books, and records, and its accounting system, regulate the return upon its public utility property, the incurring of indebtedness relating to its public utility business, and its financial transactions, and do all things in addition which are necessary and in the exercise of such power and jurisdiction, all of which as so ordered, regulated, fixed, and changed shall be just and reasonable, and such as shall provide a fair return on the property of the utility actually used or useful for public utility purposes.

Amendments to this subsection enacted in 1983 are not relevant to the instant case.

"sums up the requirements of the entire ratemaking process" and dictates "just and reasonable" rates, "such as shall provide a fair return on the property . . . used or useful for public utility purposes," *See supra* note 11. Citing general principles of rate making, the Company argues a fair return determination can only follow a finding on a fair *rate* of return. And since no such finding preceded the decision on what the amount of the return would be, it would have us declare the rate order failed to meet the statutory standard enunciated in § 269-16(b).

Whether the rates set by the Commission are "just and reasonable," however, is by no means dependent on the procedure followed by the rate-making body in deciding what return would be fair in the circumstances. "Under the statutory standard of 'just and reasonable' it is the result reached not the method employed which is controlling." *Federal Power Commission v. Hope Natural Gas Co.,* 320 U.S. 591, 602 (1944) (citations omitted); *In re Hawaii Electric Light Co.,* 60 Haw. at 637, 594 P.2d at 621. As the Supreme Court explains:

> It is not theory but the impact of the rate order which counts. If the total effect of the rate order cannot be said to be unjust and unreasonable, judicial inquiry . . . is at an end. The fact that the method employed to reach that result may contain infirmities is not then important.

Federal Power Commission v., Hope Natural Gas Co., 320 U.S. at 602. Discerning no statutory basis for faulting the method employed by the Commission in determining the return the utility was entitled to, we proceed to the question of whether the rate order, in total effect, can be said to be unjust and unreasonable.

III.

In Hawaiian Telephone's opinion the Commission failed "to provide . . . an opportunity [for the utility] to earn a

fair return . . . by arbitrarily limiting the rate award to a certain amount of net operating income" and also erred "in awarding a rate increase sufficient only to produce an annual revenue increase of $27,121,000 instead of the $47,600,000 requested." Essentially, the claim is that the rate increases were not "such as shall provide a fair return." *See supra* note 11.

A.

The Commission acknowledgedly tailored rate increases to produce less revenue than sought and to yield "a certain amount of net operating income." The resulting rate of return was 9.18% on the intrastate rate base rather than the 14.27% sought or the 11.5% and 12+% urged respectively by the Consumer Advocate and the Department of Defense, an intervenor in the proceeding.

"Rates which produce a return . . . more than 2% lower than the lowest rate of return [supported by an expert witness] in the case," Hawaiian Telephone contends, "clearly are unjust, unreasonable and confiscatory." Still, "the reasonableness of [utility] rates is not determined by a fixed formula but is a fact question requiring the exercise of sound discretion by the Commission." *In re Hawaii Electric Light Co.,* 60 Haw. at 636, 594 P.2d at 620 (citations omitted); *see also Federal Power Commission v. Natural Gas Pipeline Co.,* 315 U.S. 575, 586 (1942).[12] Fur-

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[12] The Supreme Court's opinion in pertinent part reads:

> The Constitution does not bind rate-making bodies to the service of any single formula or combination of formulas. Agencies to whom this legislative power has been delegated are free, within the ambit of their statutory authority, to make the pragmatic adjustments which may be called for by particular circumstances. Once a fair hearing has been given, proper findings made and other statutory requirements satisfied, the courts cannot intervene in the absence of a clear showing that the limits of due process have been overstepped. If the Commission's order, as applied to the facts before it and viewed

thermore, "[i]t is . . . recognized that the ratemaking function involves the making of 'pragmatic' adjustments and . . . there is a 'zone of reasonableness' within which the [C]ommission may exercise its judgment." 60 Haw. at 636, 594 P.2d at 620 (citations omitted). Viewing the decision and order in context with these precepts in mind, we cannot say the Commission arbitrarily limited the rate award or clearly erred in any other respect.

B.

The rate award was obviously shaped to take account of uncommon circumstances. Admittedly it was influenced by significant events that antecede the application for approval of rate increases, including assertions that "$130 million in transition payments [would] lessen the need for local rate increases." And revised rate schedules designed to provide the $41,700,000 in net operating income Hawaiian Telephone said would be required in test year 1982, rather than those submitted earlier by the utility, were approved. To be sure, the Commission deviated from normal practice in several respects as alleged. Yet as we observed earlier, "[a]gencies to whom [the rate-making] power has been delegated are free, within the ambit of their statutory authority, to make the pragmatic adjustments which may be called for by particular circumstances." *Federal Power Commission v. Natural Gas Pipeline Co.*, 315 U.S. at 586; *see also In re Hawaii Electric Light Co.*, 60 Haw. at 636, 594 P.2d at 620.

The particular circumstances in the considered judgment of the rate-making agency called for practical adjustments to protect the public interest, and we perceive no grounds for a countermand of the ruling. Where approval by the FCC of a plan devised by AT&T and Hawaiian Telephone

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in its entirety, produces no arbitrary result, our inquiry is at an end.

315 U.S. at 586.

to postpone ordered rate deductions for interstate services and to provide $130,000,000 in "transitional supplements" for the latter over a four-year period was procured with the support of the State of Hawaii and such support was secured on a representation that telephone users in Hawaii would otherwise be subjected to "a local rate case generating $30-35 million per year," [13] it would have been surprising if the Commission had not looked askance at a plea for approval of intrastate rate schedules calculated to produce $47,600,000 in additional revenue.

We detect no basis for deeming the rate order confiscatory. Though witnesses testifying at the contested case hearing thought a fair rate of return would be several percentage points above the 9.18% return the approved rates were likely to provide, we think 9.18% was within the 'zone of reasonableness.' *In re Hawaii Electric Light Co.*, 60 Haw. at 636, 594 P.2d at 620 (citations omitted). "[R]easonableness . . . is not determined by a fixed formula but is a fact question requiring the exercise of sound discretion . . ." *Id.* When invoked as a guide, sound discretion

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[13] *See supra* notes 4, 5, and 6. That State support for the AT&T-Hawaiian Telephone agreement was secured on representations that it lessened the need for local rate increases is clear from the correspondence between officers of Hawaiian Telephone and the State of Hawaii. For example, the letter from L. K. Toole to the Attorney General was prefaced by this statement:

> In the interest of reaching agreement between the State of Hawaii and Hawaiian Telephone for the State's support to the FCC of the ATT/HTC negotiated Agreement in FCC Docket 21263, Hawaiian Telephone offers the following explanation of relevant factors.

See Letter from L. K. Toole to Tany Hong (October 15, 1980).

And the following statement appears in an earlier letter:

> It is estimated that in the absence of the Agreement, a local rate case generating approximately $30-35 million per year or a 25-26% increase in rates to all local customers would be required to offset the effects of reduced toll revenues alone.

See letter from Donald M. Kuyper to the Hon. George R. Ariyoshi (August 13, 1980).

is that "exercised not arbitrarily or wilfully, but with regard to what is right and equitable under the circumstances and the law." *Langnes v. Green,* 282 U.S. 531, 541 (1931) (quoted in *Cooke Trust Co. v. Edwards,* 43 Haw. 226, 231 (1959)).

Here, the Commission allowed rate increases calculated to yield the net operating income Hawaiian Telephone decided it needed. The resulting rate of return for the utility was higher than the 8.5% it said would be yielded by the revised rate schedules submitted for approval. And we have recounted some of the other factors considered by the Commission in approving rate schedules structured to produce a net operating income of $41,700,000. Under the circumstances, we could not say the Commission was arbitrary; we would have to agree the rate order was fashioned with regard to what appeared right and equitable under the circumstances and the law. In the words of the Commission, "[t]o insure that rates are 'just and reasonable' includes the power to take into consideration the interest of the ratepayers as well as that of the utility owners." P.U.C. Decision and Order No. 7412, at 27.

IV.

The foregoing conclusion that the rate order was just and reasonable in total effect would normally end our inquiry. Hawaiian Telephone, however, avers the decision under review is flawed in yet another respect; it alleges the Commission erred "by making an unsupported and unlawful 'Separation Adjustment.' " We have examined the claim that the State agency invaded a federally preempted area by varying a jurisdictional separation approved by the FCC, but find the claim to be without merit.

A.

Since the property of a telephone company is used in providing both intrastate and interstate telecommunica-

tions services and expenses are incurred in the joint rendition of such services, "a separation of telephone property, revenues, and expenses between the intrastate and interstate operations of the company . . . 'is essential to the appropriate recognition of the competent governmental authority in each field of regulation.' " NARUC-FCC Separations Manual, *supra*, at 5 (quoting *Smith v. Illinois Bell Telephone Co.*, 282 U.S. 133, 148 (1930)). Hawaiian Telephone would have us rule the Commission intruded in an area reserved for federal regulation by adjusting the Company's intrastate rate base for the test year to reflect the consequences of its agreement with AT&T which deferred rate reductions on interstate telecommunications services and stipulated that its share of the revenue generated by furnishing such services during the test year would consist of a cost-based portion and a "transitional supplement."

The Commission, of course, may not interfere with federal regulation of interstate telecommunications services; the Supremacy Clause does not countenance rulings by a state rate-making agency that "may produce a result inconsistent with the objective of the federal [regulatory] statute." *Maryland v. Louisiana*, 451 U.S. 725, 747 (1981) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). Thus for example, a state agency may not adopt for its rate-making purposes a depreciation formula incompatible with the depreciation method decreed for such purposes by the FCC through a preemption order. *See New England Telephone & Telegraph Co. v. Public Utilities Commission of Maine*, 570 F. Supp. 1558 (D.Me. 1983).

Here, the Commission neither varied a formula, method, or procedure decreed by the federal agency nor tampered with interstate rates in any way. It expressly rejected the Consumer Advocate's thesis that the circumstances surrounding the approval of "transitional supplements" by the FCC rendered it appropriate for those receipts to be considered as intrastate revenue, recognizing that "[t]he use of interstate revenues to satisfy intrastate revenue re-

quirements would violate the fundamental principles of jurisdictional separations." P.U.C. Order and Decision No. 7412, at 22.

B.

These precepts also impelled the Commission to take account of the federal prologue to the local rate case in fixing the intrastate rate base, for inequity could have been the result if the FCC's action and its effect on the apportionment of property, expenses, and revenue between jurisdictions were ignored. If each agency paid no heed to the action of the other in this area of mutual concern, a possible consequence could be that some costs of plant and expenses would not be included in the rate computations of either. In the situation above, the "carrier may be deprived of a fair rate of return when interstate and intrastate jurisdictions are both taken into account." *New England Telephone & Telegraph Co. v. Public Utilities Commission,* 448 A.2d 272, 298 (Me. 1982). Conversely, where property and expenses are allocated to both jurisdictions or misallocated, the resulting rates may be unjust and unreasonable for the telephone user.

Confronted by what appeared to be a misallocation of property and expenses, the Commission decided the circumstances called for an adjustment of the intrastate rate base. It initially observed the rate base claimed by the Company in this proceeding had been derived from an application of the separations method embodied in the NARUC-FCC Separations Manual (the Ozark Plan). P.U.C. Decision and Order No. 7412, at 23. But for the crucial agreement sanctioned by the FCC, the rate base would have been computed in accord with the separations method employed in the preceding rate case, Hawaiian Plan II. *Id.* Had this been done "the intrastate earnings under present rates," the Commission found, "would have been higher than that projected . . . [by applying] the Ozark

formula." *Id.*[14] From this it deducted that in "overall effect [there was a] shifting of the expenses and plant from the interstate to intrastate operations *but* with no change in the relative use [of the plant] and no change in [the Company's] total operations." P.U.C. Decision and Order No. 7412, at 24 (emphasis in original).

It reasoned that if the order for rate integration and cost-based settlements in the federally regulated sector had been fully implemented, the Company's resort to the Ozark Plan in computing the rate base would have posed no problem. *Id.* But "[s]ince neither complete rate integration nor uniform cost based settlement will be achieved till January 1, 1985," the Commission concluded "the immediate application of the Ozark separations formula for allocating expenses and plant in this proceeding will certainly be inequitable for intrastate ratepayers." *Id.* Under these

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[14] The basis for this "finding" is stated by the Commission as follows:

> The record also indicates that under Hawaiian Plan II, the intrastate rate of return under present rates would be 5.1% while under the Ozark Plan, the rate of return under present rates would be 4.0% as shown in Exhibit No. 1 attached hereto. Thus, by changing from Hawaiian Plan II to Ozark there are considerably more allocations of expenses and rate base items from the interstate to intrastate operation. The end result is that the intrastate rate of return under present rates is reduced by 1.1% from the conversion of Hawaiian Plan II to Ozark with virtually no change in total company expenses and expenditures on an overall basis. Also, there is no evidence to show that there is a change in the relative use and operations of HTC and the cardinal rule in separations formulas is that plant and expenses must be assigned on the basis of relative use—not on the basis of revenues. Even though the transitional supplement is deemed interstate revenues, the fact of the matter is that by switching to the Ozark separations plan, there was an adverse effect on the earnings of the intrastate operations. The overall effect is the shifting of the expenses and plant from the interstate to intrastate operations *but* with no change in the relative use and no change in HTC's total operations.

P.U.C. Decision and Order No. 7412, at 23-24 (emphasis in original).

circumstances, we cannot say the Commission's adjustment of the rate base constituted clear error or arbitrary action.

" 'Rate base' represents the total investment in, or fair value of, the facilities of a utility employed in providing its service." 1 A. Priest, *supra,* at 139. "While the difficulty in making an exact apportionment [between jurisdictions] of the property [used in providing service] is apparent . . . [and] only reasonable measures [are] essential . . . it is quite another matter to ignore altogether the actual uses to which the property is put." *Smith v. Illinois Bell Telephone Co.,* 282 U.S. at 150-51 (citations omitted). Thus, a jurisdictional separation may be premised on either "actual use" or "relative use." NARUC-FCC Separations Manual, *supra.* But in this case the acceptance of estimated rate bases for interstate and intrastate services derived from an application of the Ozark formula alone would have ignored altogether the use to which some property was ostensibly put to produce interstate revenue for Hawaiian Telephone, inasmuch as the revenue consisted of a portion fixed by the formula *plus* an additional sum of $32,650,000 for the test year.[15] We see no reason to disturb the pragmatic adjustment made by the Commission to reflect the relative use of Hawaiian Telephone's facilities.

The decision and order of the Public Utilities Commission is affirmed.

Marshall M. Goodsill (*Thomas W. Williams, Jr.,* with him on the briefs; *Goodsill, Anderson, Quinn & Stifel,* of counsel) for Appellant Hawaiian Telephone Co.

Ronald Shigekane, Deputy Attorney General, for Appellee Department of the Attorney General, Division of Consumer Advocacy, State of Hawaii.

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[15] This was Hawaiian Telephone's estimate of the transitional supplement it would be entitled to for the test year 1982. *See* P.U.C. Decision and Order No. 7412, at 21.

APPENDIX G

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF HAWAII

DOCKET NO. 4588

In the Matter of the Application of

HAWAIIAN TELEPHONE COMPANY

For Approval of Rate Increases and Revised Rate Schedules.

DECISION AND ORDER NO. 8042

Filed August 14, 1984
At 11:00 o'clock a.m.

/s/ BERTHA F. KUROSAWA
Chief Clerk of the Commission

INTRODUCTION

HAWAIIAN TELEPHONE COMPANY ("HTC", "Applicant" or "Company" herein) filed a Notice of Intent to file a General Rate Increase Application pursuant to Rule 8-1 of General Order No. 1 on July 12, 1982. On December 30, 1982, pursuant to Section 269-16, Hawaii Revised Statutes, HTC filed its application for an intrastate rate increase of $108,400,000 and approval of revised rate schedules designed to produce said increase. With the proposed increase, HTC projected a 13.6% rate of return on HTC's year-end rate base for test year 1983.

At the time of the filing of the application in this docket, HTC had pending before the Commission a rate case in Docket No. 4306. HTC in its application stated that its

request of $108,400,000 would be amended by the amount this Commission awarded in Docket No. 4306. The final decision and order for Docket No. 4306 was filed on January 26, 1983 and resulted in a $27,100,000 revenue increase.

On January 18, 1983, the Department of Commerce and Consumer Affairs, State of Hawaii ("Consumer Advocate" or "CA" herein) filed a Motion to Dismiss and Objections to Completeness of Application. A hearing on said motion was held on January 21, 1983. Subsequently, by Decision and Order No. 7428 dated February 4, 1983 the commission denied the CA's motion.

On March 14, 1983, HTC filed supplemental exhibits and testimonies and amended the amount of increase requested to $82,370,000 in view of the $27,100,000 increase granted to HTC in Docket No. 4306.

Also, on March 14, 1983, HTC filed a separate application for a temporary intrastate revenue increase of $11,600,000.

In accordance with the provisions of Section 269-16, Hawaii Revised Statutes, notices of public hearings were published in each county and in *The Honolulu Advertiser* on April 26, May 9, and May 23, 1983. Notices were also published by HTC in newspapers in each county, and confirmation of the published notices were sent to the Commission. Public hearings on the Application and Temporary Rate Increase were held at the following locations:

Kauai	- May 16, 1983
Hilo, Hawaii	- May 17, 1983
Kona, Hawaii	- May 18, 1983
Maui	- May 19, 1983
Lanai	- May 23, 1983
Molokai	- May 23, 1983
Honolulu	-- May 24, 1983

On May 25, 1983, a Motion to Intervene was filed by the Hawaii Alarm Association ("HAA"). The Department

of Defense ("DOD") filed its Motion to Intervene on May 31, 1983. On June 3, 1983 the City and County of Honolulu, the County of Hawaii, the County of Kauai and the County of Maui (collectively "Counties") filed a Motion to Intervene.

On June 27, 1983, the Commission after hearing argument on the respective motions granted the DOD's and Counties' Motions to Intervene but the HAA was granted the status of a participant without intervention in this proceeding. Subsequent to the prehearing conferences which were held on June 27 and July 1, 1983, the Commission scheduled the evidentiary hearing to commence on November 14, 1983. The hearing date was, after much discussion, set to satisfy all parties.

Also, on June 29 and July 1, 1983, the hearings on the merit of HTC's application for a temporary increase were held. On September 14, 1983, the Commission issued Decision and Order No. 7671 denying HTC's request for a temporary increase.

On October 28, 1983, HAA filed a Motion For Leave as Participant. The motion was granted by the issuance of Decision and Order No. 7744, dated November 15, 1983.

The evidentiary hearings on the permanent increase of $82,370,000 were held over a period of 24 days, beginning November 14, 1983 and ending on December 19, 1983.

On February 17, 1984, the Commission in Decision and Order No. 7855 granted HTC an interim increase of $10,790,000, subject to refund, pending the final decision to be issued in this proceeding and ordered HTC to submit revised rates reflecting the interim increase.

On February 28, 1984, HTC submitted the revised rates which were approved by the Commission in Decision and Order No. 7861.

On February 27, 1984, DOD submitted its opening brief. The other parties submitted their respective briefs on Feb-

ruary 28, 1984. All parties with the exception of DOD filed reply briefs on March 6, 1984, approximately 15 months after the filing of the original application.

DESCRIPTION OF THE COMPANY

HTC, whose principal place of business and executive offices are located at 1177 Bishop Street, Honolulu, Hawaii, is a corporation incorporated under the laws of the Kingdom of Hawaii on August 16, 1883, and is now existing under and by virtue of the laws of the State of Hawaii.

HTC, a wholly-owned subsidiary of General Telephone & Electronics Corporation ("GTE"), is a public utility providing telephone and other communications services throughout the islands of the State of Hawaii. Direct circuits connect Hawaii with the United States mainland, West Germany, United Kingdom, Japan, Philippines, Australia and 14 other points throughout the Pacific. Transiting routes connect Hawaii and another 192 foreign points around the world.

Cable and microwave radio are used to provide intraisland service, while service between the islands is provided by microwave radio.

Overseas communications are provided by submarine cable and satellite facilities. Communications between Hawaii and the United States mainland are provided in conjunction with American Telephone & Telegraph ("AT&T" herein) and between Hawaii and foreign points in conjunction with other companies or governmental administrations.

HTC is subject to regulation by the Public Utilities Commission of the State of Hawaii with respect to intrastate business operations and by the Federal Communications Commission ("FCC" herein) for its interstate business operations including foreign communications, earth station ownership, and the use of authorized radio frequencies.

HTC's properties include land and buildings, telephone instruments, aerial and underground cables, conduits, wires, poles, microwave equipment, other necessary equipment, easements and rights of way. HTC owns an interest in overseas submarine cables, satellite facilities and the Micronesian Telecommunications corporation.

THE APPLICATION

The application for approval of rate increases was filed on December 30, 1982, which data was prior to the issuance of the Commission's decision in Docket No. 4306 in January, 1983, HTC's last rate case. The application requested approval of revised intrastate rates designed to produce a 13.6% rate of return on the HTC's year-end intrastate rate base for the 1983 test year.

The total amount of the requested increase in intrastate revenues for the 1983 test year, over the intrastate revenues at present rates effective on December 30, 1982, was $108.4 million. This amount represented a 54.2% increase over intrastate revenues for 1983. HTC stated in its filing that the amount of the requested increase would be reduced by the amount of any intrastate revenue increases resulting from the Commission's decision in HTC's pending rate case, Docket No. 4306. If the Commission approved the $47,600,000 increase in rates requested by the Company in Docket No. 4306, the amount of the requested increase in intrastate revenues would be reduced to $62.8 million, representing a 23.6% increase over intrastate revenues for 1983 at the rates requested in Docket No. 4306.

Notwithstanding the outcome of Docket No. 4306 (which was based on a 1982 test year), HTC alleged that it would still require a rate increase based on a 1983 test year because it will be subject to substantial increases in its expenses and investment in 1983 and that the increases were not considered in Docket No. 4306. HTC also alleged

that if the Commission approved all of the increased rates and charges requested by HTC in Docket No. 4306, its estimated rate of return on its year-end intrastate rate base was only 7.9% under the proposed rates for the 1983 test year.

Subsequent to the filing of the application the Commission issued Decision and Order No. 7412 in Docket No. 4306 (January, 1983) granting HTC a revenue increase of $27,100,000.

To reflect the increase, HTC filed supplemental exhibits and testimonies and adjusted the increase requested to $82,368,000 or an overall percentage increase of 36.4%. HTC alleged that based upon a 1983 test year, the estimated rate of return under present rates was 6.1% instead of 7.9%, and with the requested increase the rate of return would be 13.6%.

The services of which the increased revenues are sought include basic residential and business exchange services. The proposed percentage increases vary by islands within the State and by class of service from approximately 46.7% to 130%. The bases for the proposed increases were HTC's costs to serve for each island.

Increases in and the restructuring of interisland long distance rates were proposed by HTC to conform with changes in the interstate long distance rate structure for services between Hawaii and the Continental United States.

New charges for returned checks, late payment, directory listing, operator verification and interrupt service and premise visit for single line telephone repair were also proposed. The rationale was that customers who cause HTC to incur costs must pay for the costs incurred rather than have all customers bear the burden of such costs.

TEST YEAR

Prehearing Order No. 7649, filed August 22, 1983, designated 1983 as the test year for this proceeding.

THE ISSUES

The following major issues as specified in Prehearing Order No. 7649 were considered in this docket:

1. Are the projected sales and revenues for the test year reasonable?
2. Are the projected operating expenses for the test year reasonable?
3. Are the properties included in the rate base used or useful for public utility purposes, and are the proposed components of the intrastate rate base reasonable?
4. What is the fair rate of return on the Company's intrastate rate base?
5. What is the Company's intrastate revenue requirement?
6. What are the Company's costs for providing various categories of services?
7. Are expenses and plant allocated properly among unregulated, interstate and intrastate operations?
8. Are the proposed intrastate tariffs, rates and rate structure just and reasonable?

TRANSITIONAL SUPPLEMENT

The origin of the transitional supplement issue begins with the FCC decision in Docket No. 21263, the purpose of which was to determine whether, and how Hawaii-mainland telephone rates could be integrated into the nation-

wide toll rate structure without unduly burdening Hawaii intrastate ratepayers. Previous to the FCC decisions, the Hawaii-Mainland rates were approximately three times the rates for calls of corresponding distances on the mainland. Revenues from Hawaii-Mainland calls were split in approximate correspondence to the costs incurred by HTC and AT&T. With the proposed integration, the reduction of two-thirds in rates and an immediate imposition of the mainland separations/settlements procedure would result in a severe contraction of revenues to HTC and a consequent increase in revenue burden for HTC intrastate subscribers.

In view of the potential impact, both HTC and the State Government sought some modification of the separations formula so that the rate integration would not burden HTC's intrastate ratepayers. Both parties stressed the unique characteristics of Hawaiian service and argued for modifications to the nationwide separations plan which would shift somewhat more revenue responsibility from the intrastate to the interstate jurisdiction.

As a result, a joint agreement between HTC and AT&T proposed that the 1971 NARUC-FC *Separations Manual* would be applied, unadjusted, to HTC's operations for purposes of jurisdictional separations. Revenue settlements, however, would be based on the conventional separations/settlements procedure plus a transitional supplement payment reflecting differing splits each year in the growth in revenue since the base year 1979. Finally, the agreement deferred the final step of rate integration until January 1, 1985.

The issue of the transitional supplement and its impact was first discussed in *In Re Hawaiian Telephone Company*, Decision and Order No. 7412, Docket No. 4306 (January, 1983). The CA proposed, as it did in HTC's last rate case, that the total transitional supplement be credited to HTC's intrastate operations in return for the State's support of the agreement between HTC and AT&T. In this proceed-

ing, HTC's estimated test year transitional supplement revenue was $24,477,000. In its rebuttal HTC revised its estimate to $19,661,000. Further, the CA proposed that a different separations plan i.e. the Colorado Plan be used to allocate cost between HTC's interstate and intrastate operations. (The proposed colorado plan will be discussed herein under Separations) The CA's proposal was based on the assumption that this Commission in Docket No. 4306 had shifted intrastate costs to interstate by using the separations plan designated as Hawaiian Plan II.

The Counties contended that HTC is uniquely situated among all telephone companies in the nation and is permitted to earn a greater return on its interstate services than the level authorized nationally by the FCC. For all telephone companies excepting HTC, revenues are derived out of a common pool from which each carrier first receives compensation for its interstate expenses as allocated by procedures contained in the FCC/NARUC Separations Manual; and then, receives out of the residual revenue, further distributions in proportion to each carriers' interstate investment in accordance with the FCC/NARUC Separations Manual. Under this scheme, every large or small carrier with the exception of HTC, earns the same return on interstate investment. At the present time, this return is limited by the FCC to 10.4 percent. HTC was the only carrier who did not participate in the nationwide revenue pool and it was not limited to the 10.4 percent return prescribed by the FCC. In fact, HTC expects to earn a return on its interstate investment of 17.26 percent or more.

The Counties also contended that during the test year, HTC will receive its interstate revenues through settlement procedures not totally tied-in with jurisdictional cost separations and that it will receive a supplemental payment designed to ease the transition from the percentage-based division of revenues with AT&T which existed prior to 1979 to a separations-based division of revenues which

is now scheduled to become effective in 1985. HTC also participates in the division of international revenues outside the interstate settlements process.

The Counties maintained that HTC is obligated under the above circumstances to consider its interstate earnings in developing its revenue requirements for intrastate operations since a promise was made and relied upon by various officials of the State of Hawaii.

Two approaches were proposed by the Counties in adjusting the HTC's intrastate revenue request. The first which is similar to the CA's proposal would be to adjust the separated test year results of operations for intrastate service taking into account the transitional supplement payment as an offset to revenue requirements, and then to award a full rate of return on the intrastate investment. The second would be to adjust the HTC's intrastate rate of return to account for interstate earnings.

This recommended approach would require the determination of jurisdictionally separated revenue requirements by application of the FCC/NARUC Separations Procedures. The Commission would then find the appropriate rate of return based on the *Hope* standards and apply such rate of return to HTC's total rate base inclusive of the interstate portion to derive an appropriate return on a total Company basis. Then, the interstate return would be backed off leaving the residual as the appropriate intrastate return.

HTC's position is that HTC's intrastate revenue requirement must be computed utilizing the 1971 NARUC-FCC Separations Manual, as amended, and the Commission is bound by Federal and State law to decide this case on the basis of separated, intrastate results of operations. HTC also rebutted the Counties position by alleging that the transitional supplement is on a declining schedule, with 1984 being the last year in which supplemental revenues will be received and with a declining supplement, the com-

bined intrastate and interstate return will be reduced even below its current level beginning in January, 1984. Thus, the actual rate of return on intrastate operations in 1984 will be less than whatever rate of return is authorized because the new rates will not be in effect for the full year in 1984. The first full year the rates authorized in this Docket will be in effect is 1985 and this will be the first full year in which the Company will have a realistic opportunity to earn an authorized rate of return and the attrition factor will make that possibility extremely doubtful.

HTC also contended that their request for intrastate revenue requirements is in no way a violation of whatever understandings may have existed between the State and HTC because timing has made the issue moot. Because 1985 is the first full year in which the Company will be actually afforded the opportunity to earn an authorized rate of return on intrastate operations, and since the supplement will be terminated by then, HTC maintained that there are no grounds to limit HTC's rate request in this proceeding.

In *In Re Hawaiian Telephone Company,* Decision and Order No. 7412, Docket No. 4306 (January, 1983) we stated that:

> "Though *the Commission has conceded above that it cannot utilize the transitional supplement revenues as intrastate revenues,* we find that it would be totally unjust and unreasonable if HTC after obtaining the benefit of the transitional revenues were *also* to receive the benefit of the lowered intrastate return—the difference between Hawaiian Plan II and the Ozark Separation formulas. To award HTC another 1.1% increase in their return would deprive the ratepayers of any reciprocal benefits resulting from their support of the transitional Agreement. We conclude,

> as shown in the subject entitled "Revenue Increase Authorized" herein that an *appropriate adjustment* in the expenses and rate base must be made to insure that rates to be set are 'just and reasonable.'" (Emphasis Added).

We hereby reaffirm our decision that the transitional supplement revenues cannot be treated as intrastate revenues. Consequently, the CA's recommendation to treat the transitional supplement as intrastate revenues must be denied.

In this proceeding, we believe that some of the parties harbor a misunderstanding of the intent of the Commission's decision in Docket No. 4306 on the issue of transitional supplement. The Commission, in that decision, did not shift intrastate expenses to interstate and the Commission did not adopt Hawaiian Plan II as the basis for separations. As stated in our Decision and Order No. 7412, the Commission made an *appropriate adjustment* to provide reciprocal benefits to the ratepayers as a result of the State of Hawaii's, and in turn the ratepayers' support of the transitional agreement between HTC and AT&T. In making the appropriate adjustment the Commission merely took the difference in rates of return between Hawaiian Plan II and the Ozark Plan *as a basis of measurement* and applied the percentage difference to HTC's intrastate rate base. In so doing the annual cost or dollar return became a reduction in a cost or expense item in the determination of revenue requirements. We must emphasize again that the Commission made an "appropriate adjustment" and made no shift in expenses from intrastate to interstate. The Commission in Decision and Order No. 7412 adhered to jurisdictional separations when we stated that:

> "For purposes of this proceeding, the Commission finds that jurisdictional separations are required by law and that the procedures specified

by the Ozark Plan as proposed by the Company are reasonable."

The Counties resolution of the transitional supplement issue is to first determine an appropriate rate of return to HTC's total net investment, then back out the interstate dollar return and leave the residual as the intrastate return. We believe that such proposal is a somewhat roundabout proposal to accomplish the same result as proposed by the CA, i.e. to credit the transitional supplement to intrastate operations. The one major difference between the CA's and Counties' proposal is that the residual dollar return is translated to a percentage return by computing the ratio of the residual intrastate return to the intrastate rate base. Such being the case, the application of the appropriate intrastate return to the intrastate rate base would yield the same result by backing out the interstate return from the total HTC return. While we agree with the Counties' as well as the CA's intent to provide the intrastate ratepayer just and reasonable rates, we cannot agree with their methods by which the benefits would be derived.

HTC's objections to both the CA's and Counties' proposal to provide intrastate ratepayers the benefits accruing to HTC as a result of the agreement are that the benefits accruing to HTC will terminate at the end of 1984 and thus the issue of the transitional supplement will become moot. HTC also contended that rates are set for the future and the indication is that the rates will be approved sometime in 1984 and that 1985 will be the first full year in which HTC will have a realistic opportunity to earn an authorized rate of return.

Although HTC claimed that the rates to be approved in this docket will be sometime in 1984 and 1985 will be the first full year it purportedly will have an opportunity to earn an authorized return, HTC provided no evidence on what its results of operations would be for 1984 and 1985.

HTC assumed that the revenues, expenses, expenditures and conditions with the exception of the transitional supplement would remain status quo. We also note that HTC makes no distinction between an actual and normalized year used in the ratemaking process. Further, 1983 is the test year and all revenues, expenses and similar items based upon a representative year are used in setting rates for the future. Accordingly, we reject HTC's position with respect to the mootness of the benefits resulting from the agreement between HTC and AT&T.

We stated in Decision and Order No. 7412, *supra,* that:

> "The record indicates that AT&T and HTC uniform cost based settlement would be calculated by using the Ozark Plan and the transitional supplement based on a separate formula. We believe the record is clear that if the State of Hawaii, through its Governor, had not supported the negotiated settlement, the Agreement between AT&T and HTC would not have been approved by the FCC. As a result of the Agreement being approved, the Ozark Plan became applicable for settlement and jurisdictional separations purposes, and because of the Agreement HTC is currently applying the Ozark Plan in this proceeding to determine its intrastate earnings for ratemaking purposes. If it were not for the Agreement, HTC would still be using the modified separations formula Hawaiian Plan II, which was used by HTC in its last rate case before this Commission, to determine its intrastate earnings. Under Hawaiian Plan II the intrastate earnings under present rates would have been higher than that projected for the test year 1982 under the Ozark formula."
>
> "Further, we have indicated that without an agreement, the use of the Ozark Plan for *cost*

allocation purposes in this proceeding would not have been possible. Complete rate integration, if implemented as previously ordered by the FCC would have correspondingly entailed application of the Ozark separation formula and a uniform cost based settlement. Since neither complete rate integration nor uniform cost based settlement will be achieved until January 1, 1985, the immediate application of the Ozark separations formula for allocating expenses and plan in this proceeding will certainly be inequitable for the intrastate ratepayers. HTC, even with the favorable settlement it obtained with the aid of the State of Hawaii and with a return on its interstate operation which can be deemed "excessive", has nevertheless indicated that under the Ozark Separations formula, its intrastate rate of return had dropped to an unreasonable level and was required to apply for a rate increase."

We believe that the record in this proceeding further supports our previous finding in Decision and Order No. 7412 *supra,* that:

> "...... in balancing the interest of the ratepayers and the Company, the consumers would expect reciprocal benefit for the State's support of the Agreement. Full rate integration with lower interstate rates was waived by the consumers for a four year period so that HTC could "avoid any unduly rapid adverse economic impact" from complete rate integration. The ratepayers will temporarily forego the benefit of the last two rate reductions in interstate rates as a result of the Agreement......"

In Docket No. 4306 this Commission made an adjustment by reducing the amount of the revenue increase by 1.1% on the intrastate rate base so that the intrastate

rates would be just and reasonable. We find no reason to deviate from our previous decision.

We again emphasize the fact that by making such an adjustment, we are not substituting the Hawaiian Plan II for the Ozark Plan for ratemaking purposes. As we have indicated herein, the method of separating interstate and intrastate operations is based upon the Ozark Plan.

Further, though we have utilized the Ozark Plan and recognize that the FCC has jurisdiction over HTC's interstate operations this Commission is not precluded from making any present and future adjustments to HTC's intrastate results of operations in order to balance the interest of the ratepayers and HTC to fulfill our responsibility to fix "just and reasonable" rates.

Accordingly, we conclude that a rate of return adjustment of 1.1% of the intrastate rate base is necessary, fair and reasonable. This adjustment will be made as a reduction in the annual cost or revenue requirements for the test year 1983. For the sake of simplicity we will treat the adjustment as a reduction in expenses to determine the revenue requirements since the return may be considered akin to a cost or expense item in the determination of revenue requirements.

SEPARATIONS

HTC, an operating company of GTE, provides both intrastate and interstate communication services. The Federal Communications Commission (FCC) has jurisdiction over HTC's interstate services while this Commission has jurisdiction over intrastate services. Because much of the telephone plant is used in common for services regulated by both regulatory bodies, a method of separations or dividing the property, revenues, expenses, taxes, and reserves into these exclusive jurisdictions is required.

The current jurisdictional separation procedures are prescribed in the February, 1971 edition of the NARUC-FCC

Separations Manual (the Manual) which incorporates the Ozark Plan. The Manual was amended to apply to Hawaii by the FCC's Report and Order (FCC 81-312) dated July 8, 1981 adopting the Memorandum Opinion and Order of the Federal-State Joint Board on Separations in FCC Docket No. 21263. This Commission was a member of the Joint Board which issued the Memorandum Opinion and Order.

The application of the Ozark Plan was a prerequisite to Hawaii's entry into the nationwide toll division of revenue pool and the eventual integration of rates for toll services between Hawaii and the mainland. It is also a result of the agreement between AT&T and HTC, previously discussed herein under the topic Transitional Supplement.

The CA presented three studies employing different separation methodologies. The three methods are as follows: (1) Ozark separations using the frozen SPF factor; (2) a "Colorado" plan that assigns costs equally to local, state toll and interstate toll; and (3) a "Joint Board" proposal that assigns 25 percent each to interstate toll and state toll, and the remainder to local.

The CA contended that "if the transitional supplemental revenues is credited to the local exchange, the return on the local exchange would be adequate, without any other DCA - recommended adjustments being adopted." The CA maintained that all of the transitional supplement revenues had to be allocated to HTC's intrastate operations. The CA also proposed that the Colorado Plan or the Joint Board proposal be used to allocate expenses to the interstate operations in the event the Commission does not credit the transitional supplement to intrastate operations because Hawaiian Plan II does not go far enough in shifting costs to HTC's interstate operations.

As indicated previously, this Commission did not adopt the Hawaiian Plan II in HTC's last rate case and the Commission recognized the Ozark Separation Plan as being

appropriate in allocating expenses and capital expenditures between HTC's intrastate and interstate operations. The CA's proposal to adopt the Colorado Plan or the Joint Board Plan will have the effect of shifting more expenses to HTC's interstate operations in order to credit the HTC's intrastate operations with as much of the transitional supplement. For the same reasons stated above on this matter, we must reject the CA's proposal to use the Colorado Plan or the Joint Board Plan as not being appropriate in this proceeding.

The Counties did not make a proposal to utilize a Separations Plan other than the Ozark Plan but did propose revisions to the international composite station ratio. However, the Counties main purpose in making this proposal is to develop a residual return as previously discussed herein under Transitional Supplement, which proposal we have rejected.

We conclude that the Ozark Plan is the appropriate Separations Plan and will be utilized for separating HTC interstate and intrastate operations. However, this Commission reserves the right to review and make any appropriate adjustments to intrastate costs for ratemaking purposes.

INFLATION

HTC's original exhibits filed in 1982, had a test year 6.2 percent inflation factor. In its rebuttal, HTC revised the factor to 5 percent based upon the most recent data available and the GNP Implicit Price Deflator.

The CA's estimate was also 5.0 percent based upon its observation that the trend in the GNP Implicit Price Deflator had turned downward during the period 1980 and the first half of 1983.

The DOD had an inflation factor of 4.3% based upon the same deflator. The DOD used its inflation factor to reduce HTC's operating expenses by $8,600,000.

We find from the record that the test year inflation factor of 5 percent is reasonable for this proceeding.

Material Deleted

Both Dr. Smith and Dr. Legler used the "double leverage" approach to arrive at their respective equity cost rates of 12.47% and 13.93%. As stated in our discussion of capital structure, the record indicates that some of HTC's financial leverage has been moved up to the parent company level, but we disagree as to the methodology used to recognize "double leverage" in the ratemaking process. We find it to be fairer to all parties concerned to "normalize" the capital structure rather than use the weighted cost of capital of GTE, the parent company, as the equity cost of HTC. The reasons therefore were explained earlier. Dr. Legler's TELOPS approach utilized a 14% return on HTC's common equity, as compared to 15% for GTE under the "double leverage" approach, because of the perceived lower risk of HTC compared to GTE or the publicly traded independent companies. We concur that HTC's intrastate telephone operations are less risky than the sum of the risks of the various operations engaged in by GTE and the independent telephone companies.

Taking into consideration the foregoing discussion, as well as the entire record in this proceeding, the Commission finds that a 14% return on common equity is reasonable and suitable for determining HTC's overall cost of capital. In arriving at this decision, we have placed much weight on the fact that economic conditions have changed considerably from the recent past and is likely to continue at a level of slow GNP growth, moderate inflation and moderate level of interest rates.

Cost of Capital

The Commission concludes from the foregoing that HTC's cost of capital for the test year is 11.25% which is hereby determined to be just and reasonable.

	Normalized Capital Structure (%)	Cost Rate (%)	Weighted Capital Cost (%)
Short-term Debt	2.9	9.00	.26
Long-term Debt	47.6	9.13	4.35
Preferred Stock	4.9	8.08	.40
Common Equity	44.6	14.00	6.24
Total			11.25

The Commission finds, upon weighing all the testimony and exhibits in this proceeding, that a fair rate of return to HTC for its intra-state properties actually used or useful for public utility purposes is 11.25% for the test year 1983. This return is just and reasonable and, in the Commission's opinion, will provide the funds necessary to reasonably satisfy the guidelines provided in the *Bluefield* and *Hope* cases, which we have adopted.

Material Deleted

DOD:

The DOD presented no specific proposed findings of fact. We find that our decision herein includes findings on all of the subject matters relevant to DOD and our findings either admit or deny the DOD proposals to the Commission.

CA and *HTC:*

HTC and the CA did not submit proposed findings of fact, however, briefs were submitted by both parties.

INTRASTATE REVENUE INCREASE

Exhibit 4, attached hereto and made a part hereof, shows the intrastate revenue increase of $20,333,000 necessary to produce an intrastate 11.25% return with an adjustment

to render the intrastate rates just and reasonable, as discussed herein, under Transitional supplement.

Since we have already provided an interim increase of $10,790,000 previously in our Decision and Order No. 7855, we find that an additional increase of $9,543,000 is necessary, just and reasonable.

ULTIMATE FINDINGS AND CONCLUSIONS

BASED ON THE ENTIRE RECORD AND THE FOREGOING FINDINGS OF FACT, THE COMMISSION HEREBY MAKES THE FOLLOWING ULTIMATE FINDINGS AND CONCLUSIONS OF LAW:

1. After due notice to all concerned and in accordance with law, public hearings have been held in Docket No. 4588, an agency hearing has been held, evidence has been submitted, the Commission is fully informed, and all matters in docket No. 4588 stand submitted.

2. For purposes of this proceeding, the Commission finds that jurisdictional separations are required by law and that the procedures specified in the Ozark Plan as proposed by HTC are reasonable.

3. The test year for the purpose of this proceeding is the calendar year 1983.

4. The intrastate operating revenues, and intrastate operating expenses and taxes, as set forth in Exhibit No. 2, attached hereto and made a part hereof, are found to be just and reasonable for the purposes of determining the amount of increase to be allowed.

5. The year end intrastate rate base for test year 1983 is $443,813,000.

6. Under existing rates, HTC's test year earnings will provide a rate of return of 8.0% on the intrastate rate base. (See Exhibit No. 3)

7. The use of HTC's parent company weighted cost of capital as HTC's cost of common equity is inappropriate for this proceeding. A reasonable capital structure for HTC is the average capital structure for GTE's domestic telephone operating companies.

8. A 14 percent return on common equity is reasonable in determining HTC's overall cost of capital.

9. A fair rate of return to HTC for its intrastate properties actually used or useful for public utility purposes is 11.25 percent for the test year.

10. HTC is granted a rate increase which will produce an annual revenue increase of $30,840,000 before adjustment.

11. An adjustment of $10,507,000 to provide just and reasonable rates for the intrastate telephone users is in the public interest.

12. The interim increase of $10,790,000 granted earlier was just and reasonable.

13. An additional increase of $9,543,000 over and above the interim increase is necessary, just and reasonable.

14. HTC's proposed intrastate charges, as amended, are reasonable.

15. HTC's proposed revised maintenance charges are disapproved.

16. The interim rates which will become permanent are just and reasonable and no refund is necessary.

17. The increase of $9,543,000 to the service connection charges or non-recurring activities is reasonable.

18. The new rate schedules, to be attached hereto as Exhibit No. 5 and made a part hereof, and the rates and charges therein are just and reasonable.

19. The four exhibits, attached hereto and made a part hereof, are reasonable for determining HTC's test year revenue requirements.

20. The increased rates and charges authorized herein are necessary, just, reasonable and non-discriminatory and passes through to customers only increased costs to HTC for the services or commodities furnished by it.

21. That each of the specific findings of fact hereinbefore made is hereby adopted as ultimate findings and conclusions of law by the Commission.

ORDER

WHEREFORE, GOOD CAUSE APPEARING THEREFORE, IT IS HEREBY ORDERED THAT:

1. The new rate schedules, to be attached hereto as Exhibit No. 5, and made a part hereof, shall become effective on and after August 25, 1984.

2. HTC shall provide to the Commission the new intrastate schedules (including the Private Line Service as provided for under Decision and Order No. 8016) reflecting the increases authorized herein and in accordance with the findings made herein. The revised rate schedules shall be served on the parties and shall be filed with the Commission by August 21, 1984.

3. HTC shall provide notice by direct mail to each of its customers explaining the new intrastate charges, its impact and available options to minimize costs to the consumers. The proposed new charges shall take effect only after 30 days notice has been provided to its customers.

4. HTC shall, after the new intrastate charges take effect, file a report showing (1) what the customer reactions to the *new* charges have been, and (2) the revenue and cost of operation impact due to the *new* charges. The first report shall be filed on December 31, 1984, and at the end of every quarter thereafter.

5. HTC shall submit to the Commission the revised intrastate rate schedules reflecting the increases authorized herein and in accordance with the findings made herein. The revised rate schedules shall be served on the parties and shall be filed with the Commission by August 21, 1984.

DONE at Honolulu, Hawaii, this 14th day of August, 1984.

PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

By /s/ALBERT TOM
Albert Tom, Chairman

By /s/SUNAO KIDO
Sunao Kido, Commissioner

APPROVED AS TO FORM:
/s/HARRY S. Y. KIM
HARRY S. Y. KIM
Commission Counsel

HAWAIIAN TELEPHONE COMPANY
1983 TEST YEAR EXPENSE SUMMARY
($000's)

Expense Account	Total Company Residual Expenses	Attributable Transfer Costs	Business Transfer Costs	Total Company Regulated Expenses	Separation Factor (%)	Intrastate Expenses
Maintenance	$ 78,892	$ 89	$ 68	$ 78,735	68.5	$ 53,933
Traffic	11,464			11,464	49.5	5,675
Commercial	21,042	2,593		18,449	76.0	14,021
Marketing	4,226			4,226	62.1	2,624
Advertising	1,102			1,102	63.6	701
General Office Salaries & Expenses	22,370		1,728	20,642	66.2	13,665
Insurance & Damages	412		45	367	68.7	252
Operating Rents	13,006	786		12,220	21.1	2,578
Relief & Pensions	18,126	691	204	17,231	65.8	11,338
General Services & Licenses	2,722		299	2,423	62.4	1,512
Earth Station	660			660	0.0	—
Expenses Charged Construction	(4,087)			(4,087)	65.8	(2,689)
Wage Normalization	1,584			1,584	67.3	1,066
Other Expenses	582			582	68.7	400
Depreciation & Amortization Expense	74,075		95[1]	73,980	70.2	51,934

[Exhibit 1 continued on next page]

Expense Account	Total Company Residual Expenses	Attributable Transfer Costs	Business Transfer Costs	Total Company Regulated Expenses	Separation Factor (%)	Intrastate Expenses
Business Information Systems	(310)	(4)	(4)	(302)	66.2	(200)
Supply & Transportation	(2,544)	(31)	(34)	(2,479)	66.2	(1,641)
Management Wage Adjustment	(1,901)	(30)	(32)	(1,839)	66.2	(1,217)
Relocation Expenses	(204)	(3)	(3)	(198)	66.2	(131)
Customer Deposits	119	—	—	119	66.2	(79)
Accrued Vacation Expenses	(896)	(14)	(10)	(872)	66.2	(577)
Depreciation To Clearing	59	—	—	59	66.2	39
Capital Carrying Costs	—	1,036[2]		(1,036)	70.2	(727)
Operating Taxes	22,999	175	66	22,758		17,484
Total	$263,498	$5,288	$2,422	$255,788		$169,961

[1] Depreciation To Non-Regulated Operations.
[2] Capital Carrying Costs As Offset To Expenses.
[3] 73.2% of Total Company Operating Taxes Plus Escalation of Public Service Company Tax.

EXHIBIT 1

HAWAIIAN TELEPHONE COMPANY
RATE BASE
(000's)

	Total Company	Separations Factor (%)	Intra-state
Plant-In-Service	1,091,520	68.4	746,600
Short Term Work In Progress			
Less:			
Customer Deposits			1,277
Depreciation and Amortization Reserve	323,436	65.7	212,497
Deferred Income Taxes	132,444	69.8	92,420
Unamortized Investment Tax Credit	28	67.9	19
Add:			
Property Held for Future Use	329	81.5	268
Materials and Supplies	5,022	63.4	3,182
Working Cash	—	—	—
Total Rate Base			$443,813

EXHIBIT 2

HAWAIIAN TELEPHONE COMPANY
RESULTS OF OPERATIONS UNDER EXISTING RATES AND AT 11.25% RETURN
($000's)

	Results Under Existing Rates	Increase Without Appropriate Adjustment	Results At 11.25% Return
Revenues:			
Gross Revenues	$216,580	$30,840	$247,420
Uncollectibles	(1,014)	(299)	(1,313)
Net Revenues	$215,566	$30,541	$246,107
Expenses:			
Maintenance	$ 53,933	$(2,662)	$ 51,271
Traffic	5,675	(172)	5,503
Commercial	14,021		14,021
Marketing	2,624		2,624
Advertising	701		701
General Office Salaries & Expenses	13,665		13,665
Insurance & Damages	252		252
Operating Rents	2,578		2,578
Relief & Pensions	11,338		11,338
General Services & Licenses	1,512		1,512
Expenses Charged Constr.	(2,689)		(2,689)
Wage Normalization	1,066		1,066
Other Expenses	400		400
Depreciation & Amortization Expense	51,934		51,934

[Exhibit 3 continued on next page]

	Results Under Existing Rates	Increase Without Appropriate Adjustment	Results At 11.25% Return
Business Information Systems	(200)		(200)
Supply & Transportation	(1,641)		(1,641)
Management Wage Adjustment	(1,217)		(1,217)
Relocation Expenses	(131)		(131)
Customer Deposits	(79)		(79)
Accrued Vacation Expenses	(577)		(577)
Depreciation To Clearing	39		39
Capital Carrying Costs	(727)		(727)
Operating Taxes	17,484	4,892	22,376
Total Operating Expenses	$169,961	$ 2,058	$172,019
Operating Income Before Income Taxes	$ 45,605	$28,483	$ 74,088
Income Taxes	$ 10,127	$14,032	$ 24,159
Net Operating Income	$ 35,478	$14,451	$ 49,929
Rate Base	$443,813		$443,813
Return On Rate Base	8.0%		11.25%

EXHIBIT 3

HAWAIIAN TELEPHONE COMPANY
REVISED
INTRASTATE REVENUE INCREASE WITH APPROPRIATE ADJUSTMENT BASED ON 1983 TEST YEAR

	$000's
Increase Necessary To Produce An 11.25% Return On Rate Base	$32,009
Less: Appropriate Adjustment As Discussed, *Supra,* Under Transitional Supplement	$10,507[1]
Total Revenue Increase Authorized	$21,502
Less: Interim Increase Granted Per Decision and Order No. 7855	10,790
Additional Increase	$10,712

EXHIBIT 4 AS AMENDED

[1] Rate Base x % Appropriate Adjustment Factor ÷ Interstate Gross Revenue Factor = $443,813 x .011 ÷ .46463 = $10,507

DISSENT OF COMMISSIONER CLYDE S. DuPONT

Again, as in the Commission's Decision and Order No. 7412, Docket No. 4306, I find many of the same infirmities in this Decision and Order and I must, therefore, disagree with the majority.

The majority has continued to tap interstate revenues for intrastate costs as it did in Decision and Order No. 7412. The Hawaiian Telephone company appealed that decision to the Supreme Court of the State of Hawaii and argument has been heard by that esteemed court in the case. A decision has yet to be rendered and in the absence of such a decision I, too, must hold to my views which I expressed in my dissent in Decision and Order No. 7412. The use of interstate revenues for intrastate costs is illegal. Despite the protestations to the contrary, the majority continues to undercut the Ozark Plan which it ostensibly adopts. In this decision and order, the majority does not recite at length as it did in Decision and Order No. 7412, the reliance it places on its interpretation of an agreement between the State of Hawaii and the Hawaiian Telephone Company regarding State support for the transitional supplement before the Federal Communications Commission. However, because of the references it makes to its previous decision, I surmise that all of the reasons it stated in that decision continue to be the foundation for the continued illegal use of transitional supplement revenues in this decision. Because of its far reaching impact in this case I must strongly disagree with the majority here.

Deregulation of the telecommunications industry has presented a very new and important set of issues to this Commission as it has for all other public utility commissions which set the rates for telephone companies on the Federal and State levels. The Hawaiian Telephone Company has attempted in this docket to allocate expenses and revenues between its regulated and deregulated activities

through formulas contained in its Non-regulated Activities Accounting Guidelines commonly referred to as NAAG. Although, an extensive discussion was held on the components of NAAG in this docket, I view it as only the beginning of a fairly long-term refining process to isolate the costs associated with the Company's non-regulated activities. This process is essential to insure that the ratepayers utilizing regulated activities of the Company are not saddled with costs of deregulated activities. Because of the absence of any kind of "track record" in the telecommunications field on the Federal and State levels, valid questions can be raised regarding the use of NAAG and its components.

However, a first step must be taken to sort out the accounts so as to insure fairness to the telephone using public and the Company. One cannot help but be impressed at this state of the process that arbitrary decisions are being made by all of the actors taking part in this scenario. This feeling of arbitrariness, regrettably, will remain with us for an uncertain length of time until more data is accumulated and the collective experiences of all involved in this process can be collated and analyzed. Hopefully, the pool of expertise will expand considerably over the next year with the result that the present uncertainty will yield to a more solid footing for the separation of costs and revenues between the regulated and deregulated activities of not only the Hawaiian Telephone Company but all public utility telecommunication companies.

Although, my decision in this issue is shadowed with questions, I have concluded that the NAAG proposal of the Company is one that should be adopted as it presents the most extensive display of evidence in the case. The examination of the Consumer Advocate and his conclusions regarding NAAG is insufficient, in my view, to justify rejection of NAAG as the initial step in this evolutionary process of separating the costs and revenues of the Company's deregulated and regulated activities. In the absence

of more reliable data, I believe the proxies and factors used by the Company should be adopted with NAAG serving as the focal point for further intensive examination of the problem. I, therefore, disagree with my colleagues in their decision regarding NAAG.

As in previous Commission decisions, I will continue my disagreement with my colleagues regarding charitable contributions. In this case, the Company has earmarked $404,000 for charitable contributions. As I have cited in my previous decisions on this issue, charitable contributions have become not only a common business expense but is expected by the community. It is part of doing business at all levels and therefore, should be allowed as an expense.

With regard to the time frame in which public utility rate case decisions are rendered by this Commission, I feel constrained to again comment on what I believe continues to be a vexing problem. I still view the time taken to decide this case as well as other rate cases being too long, I maintain that Section 269-16(d) of the Hawaii Revised Statutes as mandating the completion of public utility rate cases within nine months. My experience tells me that it can and should be done. The fact that this Commission has received authorization by statute to issue interim rate increase decisions does not obviate the need for more expedited issuance of its public utility decisions.

DONE at Honolulu, Hawaii, this 14th day of August, 1984.

/s/CLYDE S. DUPONT
Clyde S. DuPont,
Commissioner

APPENDIX H

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF HAWAII

DOCKET NO. 4306

In the Matter of the Application of

HAWAIIAN TELEPHONE COMPANY

For Approval of Rate Increases and
Revised Rate Schedules.

DECISION AND ORDER NO. 7412

Filed January 26, 1983

At 4:15 o'clock P.M.

/s/ BERTHA F. KUROSAWA
Chief Clerk of the Commission

INTRODUCTION

This matter came before the Commission on June 8, 1981, when Hawaiian Telephone Company ("HTC", "Applicant" or "Company" herein) filed a Notice of Intent to file a General Rate Increase Applications pursuant to Rule B-1 of General Order No. 1. The Notice advised the Commission that HTC intended to file for a general rate increase in August, 1981.

On August 23, 1981, MTC filed its application pursuant to Section 269-16, Hawaii Revised Statutes, requesting approval of an intrastate rate increase totalling $47,600,000 annually and approval of revised rate schedules designed to produce said increase. With the proposed increase, HTC

projected an 8.6% rate of return on HTC's average rate base for the test year 1982. Subsequently HTC, in its rebuttal testimony, raised the rate of return from 8.6% to 8.9%. Pursuant to rule 8-3 of this Commission's Rules of Practice and Procedure the filed Application was accompanied by HTC's written direct testimony and exhibits.

On September 15, 1981 the Department of Commerce and Consumer Affairs ("CA" herein) filed a Motion requesting that the Commission find MTC's Application to be insufficient. The CA contended that the Application was insufficient because (1) HTC's proposed changes to the individual rates and charges were without cost justifications (Rule 8-2(2) of the Commission's General Order No. 1) and (2) HTC failed to file any "earnings results" for Company operations, either on a County basis or by particular divisions of the Company's total utility operations (Rule 8-3(4) of the Commission's General Order No. 1).

On September 22, 1981 the Commission issued a Notice of Hearing on the CA's Motion, to be held on September 30, 1981. On September 23, 1981 the Company filed a Memorandum in Opposition to the CA's Motion On September 29, 1981 the CA filed a Reply Memorandum. A hearing on the Motion was held on September 30, 1981. On October 2, 1981 the Commission, after stating its reasons, denied the CA's Motion (See Order No. 6809). Among other things the Commission's Order held that Rule 8-2(2) does not state or require that a cost of service study must be submitted with a rate increase application and that Section 91-10(5), H.R.S., and Rule 3-3(4) do not automatically require an applicant to provide "earnings results" for each County where it has a Statewide operation, and that facts shown by HTC's affidavits as to why no County earnings results can be provided appear reasonable. The Commission also noted that the CA could obtain cost data or available studies from HTC through the information request process which is the right of every party prior to the hearings on the merits of the application. The Com-

mission further noted that the CA was not deprived of due process in not having, at the time the application was filed, data or studies which the CA believes is critical to its rebuttal case since the information request procedures are available to all parties prior to the hearings on the merits.

On October 16, 1981 the CA filed a Motion to Consolidate this Docket with Docket No. 3423 now pending before the Commission. Docket No. 3423 is a proceeding initiated by the Commission in June 1976. Said docket is a four phase investigation of HTC's rate design and structure and the subject matters are as follows.

I. Interisland Message Telephone Service ("MTS") and Wide Area Telephone Service ("WATS");

II. Private Line Service;

III. Vertical and Miscellaneous Services; and

IV. Basic Exchange Service.

Phase I of Docket No. 3423 has already been completed with the issuance of Decision and Order No. 5952 dated November 20, 1979 ordering revised rate schedule for Message Toll Service (MTS) and Wide Area Telephone Service (WATS) inter-island telephone services, effective December 16, 1979.

Since Decision and Order No. 3952 was issued, however, Docket No. 3423 has not been completed with Phases II, III & IV pending. The CA contended that although it had been the CA's understanding that HTC would submit additional documents in the fall of 1979 to facilitate an investigation into the second phase of Docket No. 3423, no documents were submitted.

The CA also contended that HTC's present request for a substantial rate increase will, of course, have a significant impact upon the subject matter of the remaining three

phases of Docket No. 3423 and therefore it is not only appropriate, but necessary that the issues identified in Docket No. 3423 be resolved simultaneously with this proceeding so that the parties' efforts need not be duplicated. Accordingly, the CA requested that Docket Nos. 4306 and 3423 be consolidated.

On November 2, 1981 the Company filed a Memorandum in Opposition to the CA's Motion to Consolidate. On November 23, 1981 the CA filed a Reply Memorandum.

On November 30, 1981, a Motion to Intervene and Become a Party was filed by the Department of Defense ("DOD" herein).

On December 1, 1981 the Commission issued a Notice of Hearing on the CA's Motion to consolidate Dockets 4306 and 3423 and on the DOD's Motion to Intervene and Become a Party for December 9, 1981. Also on December 1, 1981, the Commission issued a Notice of Prehearing Conference in Docket 4306 for December 18, 1981.

On December 7, 1981 HTC filed a Memorandum in Opposition to the Motion of the DOD to Intervene and Become a Party.

On December 9, 1981 a hearing was held on the DOD's Motion to Intervene and Become a Party and the CA's Motion to Consolidate. The Commission granted the Motion of the DOD to Intervene and Become a Party. The Commission denied the CA's Motion to Consolidate Docket 4306 and Docket 3423.

In accordance with the provisions of Section 269-16(h), H.R.S., notices of public hearing in Docket 4306 on each of the Islands of the State were published by the Commission in *the Honolulu Advertiser* on October 19, October 26, and November 7, 11, 14, 16 and 17, 1981. Notices of public hearings were also published by HTC in newspapers on each Island, and notification thereof were sent to the Commission.

Public hearings on the Application were held as follows:

Honolulu	- November 9, 1981
Kauai	- November 12, 1981
Lanai	- November 16, 1981
Molokai	- November 16, 1981
Naui	- November 17, 1981
Kona Hawaii	- November 18, 1981
Hilo, Hawaii	- November 19, 1981

On December 11, 1981 the CA filed a Motion for a Declaratory Order requesting the Commission to limit the rate relief sought by MTC in certain respects. On December 16, 1981 HTC filed a memorandum in Opposition to the CA's Motion for Declaratory Order. On December 17, 1981 the Commission issued Decision and Order No. 6913 denying the CA's Motion for Declaratory Order."*

A Motion for Reconsideration of the Commission's decision denying its Motion for a Declaratory Order was filed by the CA on December 28, 1981. On January 7, 1982 the Company filed a Reply to the CA's Motion for Reconsideration of the Commission's denial of its Motion for Declaratory Order. On January 11, 1982 the Commission issued Decision and Order No. 6939 denying the CA's Motion for Reconsideration of its Motion for Declaratory Order.

On December 15, 1981 HTC, the CA and the DOD each filed a Prehearing Conference Submission.

On December 18, 1981 the first prehearing conference was held, at which all parties appeared.

HTC submitted a draft of a Proposed Prehearing Order on December 31, 1981 and a second draft of a Proposed Prehearing Order on January 5, 1982. The Commission issued Prehearing Order No. 6976 on February 9, 1982.

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* The reasons for the denial of the declaratory order is more fully explained herein.

Pursuant to the Prehearing Order, the parties were to exchange Information Requests and Responses thereto. On March 19, 1982 the CA filed a Motion to Compel and Request for Information requesting that the Commission order HTC to answer certain supplemental information requests and additional information requests and requested a hearing on its Motion. On March 30, 1982 HTC filed a Response to the CA's Motion to Compel and Request for Information. On March 31, 1982 a hearing was held on the CA's Motion to Compel and Request for Information. At the hearing it appeared that the various information requests made by the CA had been satisfied and therefore no ruling on the Motion was required.

On January 28, 1982 HTC filed a Notice that the Company would file an Application for a temporary rate increase, subject to refund, in this docket.

On March 9, 1982 HTC filed Application for a Temporary Increase, subject to refund, in accordance with Section 269-16(c) H.R.S., to be effective no later than July 1, 1982.

On March 19, 1982 the DOD filed an Opposition to the Company's Application for a Temporary Rate Increase. An amended Opposition by the DOD was filed March 31.

Notices of a public hearing on the Application for Temporary Rate Increase were published by the Commission in *The Honolulu Advertiser* on April 13, 20, 27, and May 3, 1982, in the *Hawaii Tribune-Herald* on April 12, 1982, in the *Maui News* on April 12, 1982; and in *The Garden Island* on April 12, 1982. Notices of public hearings were also published by the Company in newspapers on each Island and notification thereof were sent to the Commission. The public hearing on the Temporary Rate Increase Application was held in Honolulu on May 5, 1982.

On April 7, 1982 the CA filed a Memorandum in Opposition to the Application for a Temporary Rate Increase.

MTC filed a Reply to such Memorandum on April 13, 1982. HTC filed an amendment to its Reply on May 10, 1982, withdrawing its request that the Commission hold public hearings on the temporary rate increase on the neighbor Islands.

On April 13, 1982 the DOD filed its written testimony and exhibits. On April 16, 1982, the CA filed its written testimony and exhibits.

On May 17, 1982 the Company filed its written rebuttal testimony.

A second prehearing conference was held on May 20, 1982 to finalize the scheduling of witnesses and decide other procedural matters.

Evidentiary hearings in this docket were held in Honolulu on May 24, 25, 26, 27, 28, June 1, 2, 3, 4, 7, 8, 9 and 10, 1982. On June 3 a separate hearing was held on the Temporary Rate Increase Application.

Nineteen witnesses testified on behalf of HTC. HTC submitted prepared direct and rebuttal testimony and numerous exhibits in support of such testimony. The Company also requested the admission into evidence of all of its responses to Information Requests of the CA, the DOD and the staff of the Commission.

Fourteen witnesses testified on behalf of the CA. The CA submitted prepared testimony and numerous exhibits in support of such testimony. The CA also requested the admission into evidence of its responses to the Information Requests of HTC.

One witness testified on behalf of the DOD.

[Material Deleted]

THE TRANSITIONAL SUPPLEMENT

An Agreement was entered into between American Telephone and Telegraph (AT&T) and HTC, dated July 23,

1980, approved by both the FCC and the Joint Board* in a decision adopted June 29, 1981 (FCC Docket No. 21263), which among other conditions, provides for the division of interstate MTS (message telephone service) and WATS (wide area telephone service) revenues between HTC and AT&T.** Specifically, the Agreement provides that for

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* The Hawaii PUC was a participant in the Joint Board together with the FCC and several other state representatives.

** The preamble of the Agreement stated the following:

"WHEREAS, the Federal Communications Commission (FCC) has determined the public interest requires that interstate NTS and WATS rates for service to and from Hawaii be integrated into the U.S. Mainland domestic rate pattern, *Establishment of Domestic Communications- Satellite Facilities*, 35 F.C.C.2d 844 (1972); that such rate integration should be accomplished by phased reductions in three steps, *Integration of Rates and Services*, 61 F.C.C.2d 380 (1976); and that such rate integration should be accompanied by cost-based settlements based on prescribed jurisdictional separations procedures, *Integration of Rates and Services*, 61 F.C.C.2d 380 (1976), *Reconsideration*, 65 F.C.C.2d 32[illegible] (1977), *Memorandum Opinion and Order*, FCC 768-693, released September 29, 1978;

WHEREAS, such rate integration has largely been accomplished in that Step I reducing rates by approximately 33% of the pre-rate integration disparity was implemented March 1, 1976; Step II reducing rates by an additional 33% of the disparity was implemented July 1, 1977; Interim Step III reducing rates by an additional 11% of the disparity was implemented January 21, 1979; *and full rate integration (completion of the remainder of Step III) is to take place not later than 90 days following prescription of jurisdictional separations rules, Memorandum Opinion and Order*, FCC 78-693, released September 29, 1978;

WHEREAS, the FCC convened a Federal-State Joint Board in Docket 212673 to recommend what modifications, if any, should be made to existing jurisdictional separations procedures prescribed by the Commission so that the FCC may prescribe separations procedures to be applied to Hawaii, *Notice of Inquiry, Proposed Rulemaking and Creation of Federal-State Joint Board*, 64 F.C.C.2d 1033 (1977), and that Joint Board is nearing completion of its

1981 through 1984 *the interim* MTS and WATS settlement between AT&T and HTC will consist of a uniform cost-based settlement *plus* a transitional supplement. The uniform cost-based settlements will not be fully implemented until January 1, 1983. The transitional settlement will be based on a decreasing percentage of the cumulative total revenue growth from January 1, 1980 (over 1979) in actual two-way Hawaii interstate MTS and WATS revenues. HTC, after January 1, 1985, will determine its division of revenues with AT&T based on the then prevailing jurisdictional separations formula, as approved by the FCC, that is used by all of the other states.

One of the major issues resulting from the Agreement in this case is the CA's contention that the test year transitional supplement to HTC must be treated as intrastate revenues and be credited to local exchange revenues. The CA's test year estimate of the transitional supplement was $20,866,000 after taxes, based on before tax revenues of $38,328,000. In its rebuttal testimony, HTC revised its estimate of the supplement to $32,650,000 before taxes.

The CA's proposal would have the effect of utilizing the entire 1982 transitional supplement revenues to meet a portion of the MTC's test year interstate revenue require-

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deliberations;

WHEREAS, *the carriers believe it to be in the public interest* for the Joint Board in Docket 21263 to recommend that the FCC to prescribe the NARUC-FCC Separations Manual (Feb. 1971 Ed.) (Separations Manual) as incorporated in the FCC rules at Part 67 (47 CFR § 67.1), with uniform recognition of HAWAIIAN's role as an international carrier, for jurisdictional separations and cost-based settlements in Hawaii, but *defer* full implementation of uniform cost-based settlements based on the Manual and *full implementation of rate integration for the purpose of effecting a transition from the present non-integrated rates and negotiated settlements to avoid any unduly rapid adverse economic impact of said actions.*" (Emphasis added).

ments. HTC strenuously objected to this proposal and stated that it would be in violation of both federal and state law and in violation of this Commission's Decision and Order No. 4983 requiring jurisdictional separations. We have previously held in prior decisions that HTC's rate cases must be decided on a separated, intrastate basis. The use of interstate revenues to satisfy intrastate revenue requirements would violate the fundamental principles of jurisdictional separations. In the Foreword of the NARUC/FCC Separations Manual (referring to the decision of the U. S. Supreme Court in *Smith v. Illinois Bell Tel. Co.*, 282 U.S. 133 (1930)) the following is stated:

> The Court, in its decision, emphasized that a separation of telephone property, revenues, and expenses between the intrastate and interstate operations of the Company involved "is essential to the appropriate recognition of the competent governmental authority in each field of regulation."

The CA's prime contention on this issue is that the negotiations relating to the division of revenues based on uniform cost-based settlement and the transitional supplement between AT&T and HTC on the one hand, and HTC and the State of Hawaii on the other were negotiated with the intent of awarding the entire transitional supplement to the intrastate ratepayers in any future rate proceeding. HTC denied that this was the intent, and stated that the supplement was intended to mitigate the adverse financial effects on the Company when changing from the traditional 78%/22% division of revenues arrangement.

The record indicates that AT&T and HTC uniform cost based settlement would be calculated by using the Ozark Plan* and the transitional supplement based on a separate

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* The Ozark Plan is the current designation of the jurisdictional separations formula used by all of the other states.

formula. We believe the record is clear that if the State of Hawaii, through its Governor, had not supported the negotiated settlement, the Agreement between AT&T and HTC would not have been approved by the FCC. As a result of the Agreement being approved, the Ozark Plan became applicable for settlement and jurisdictional separations purposes, and because of the Agreement HTC is currently applying the Ozark Plan in this proceedings to determine its intrastate earnings for ratemaking purposes. If it were not for the Agreement, HTC would still be using the modified separations formula Hawaiian Plan II, which was used by HTC in its last rate case before this Commission, to determine its intrastate earnings. Under Hawaiian Plan II the intrastate earnings under present rates would have been nigher than that projected for the test year 1982 under the Ozark formula.

The record also indicates that under Hawaiian Plan II, the intrastate rate of return under present rates would be 3.1% while under the Ozark Plan, the rate of return under present rates would be 4.0% as shown in Exhibit No. 1 attached hereto. Thus, by changing from Hawaiian Plan II to Ozark there are considerably more allocations of expenses and rate base items from the interstate to intrastate operation. The end result is that the intrastate rate of return under present rates is reduced by 1.1% from the conversion of Hawaiian Plan II to Ozark with virtually no change in total company expenses and expenditures on an overall basis. Also, there is no evidence to show that there is a change in the relative use and operations of HTC and the cardinal rule in separations formulas is that plant and expenses must be assigned on the basis of relative use—not on the basis of revenues. Even though the transitional supplement is deemed interstate revenues, the fact of the matter is that by switching to the Ozark separations plan, there was an adverse effect on the earnings of the intrastate operations. The overall effect is the shifting of the expenses and plant from the interstate to in-

trastate operations *but* with no change in the relative use and no change in HTC's total operations.

Further, we have indicated that without an agreement, the use of the Ozark Plan for *cost allocation* purposes in this proceeding would not have been possible. Complete rate integration, if implemented as previously ordered by the FCC would have correspondingly entailed application of the Ozark separation formula and a uniform cost based settlement. Since neither complete rate integration nor uniform cost based settlement will be achieved until January 1, ~~1985,~~ the immediate application of the Ozark separations formula for allocating expenses and plant in this proceeding will certainly be inequitable for the intrastate ratepayers. HTC, even with the favorable settlement it obtained with the aid of the State of Hawaii and with a return on its interstate operation which can deemed "excessive", has nevertheless indicated that under the Ozark Separations formula, its intrastate rate of return had dropped to an unreasonable level and was required to apply for a rate increase.

The Consumer Advocate also urged in their briefs that the Commission utilize the doctrine of equitable estoppel so that HTC's transitional settlement amounts can be credited as revenues for the "local" or intrastate operation. We have decided above that to incorporate the settlement amounts as intrastate revenues would be contrary to the federal laws relating to jurisdictional separations. We believe, however, that the record is abundantly clear that when the President of HTC wrote to the Governor of the State of Hawaii on August 13, 1980 indicating the need for the Governor's support for the approval of the settlement agreement between AT&T and HTC, a representation was made by HTC that in the absence of an Agreement with AT&T, a local rate case generating approximately $30-35 million *per* year would have to be filed to offset the effects of reduced toll revenues. More spe-

cifically the following was stated by Mr. Kuyper of HTC in his letter to the Governor of the State of Hawaii:

> "1. *Lessens need to increase local rates*
>
> In providing supplementary transition payments above uniform nationwide settlements of approximately $130 million over the contract term, the Agreement significantly lessens the need to increase local rates to fully allowable levels to maintain an adequate overall rate of return.*
>
> It is estimated that in the absence of the Agreement, a local rate case generating approximately $30-35 million per year or a 25-26% increase in rates to all local customers would be required to offset the effects of reduced toll revenues alone. This increase would be well within the local rates of return recently awarded to other utilities in the State of Hawaii and would have to be filed immediately should we lose the benefits provided by the Agreement.
>
> It should be noted that while the Agreement is beneficial compared to the alternative of no agreement, it still does not necessarily preclude the need for future rate relief. While we have "held the line" due to productivity and technological efficiency for several years, inflation is catching us too. It has been foreseeable for some time that we would be required to file for rate relief for factors other than loss of toll revenues. While I would like to be more specific, the uncertainty of the future does not allow us to make precise predictions. The outcomes of the various

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* In the same letter HTC indicates that its current (1980) interstate rate of return is in the 17-18% range compared to a nationwide coverage rate of return of 10.5%.

FCC proceedings now being considered would be financially significant to us."

The governor subsequently wrote to the chairman of the FCC on October 14, 1980 indicating that the State of Hawaii supported the negotiated Agreement between AT&T and HTC because the concerns of the State *"have been resolved in a manner that is satisfactory to all parties, and that local users of telephone services in Hawaii will benefit from the Agreement"*. (Emphasis added) The FCC by Report and Order, FCC 81-312, approved the AT&T and HTC negotiated agreement on June 29, 1981 with a release date of July 8, 1981. The Federal State Joint Board approved the Agreement also on the same date. In both Reports and Orders a finding was made that the State of Hawaii supported the settlement. However, after the support was given and before the FCC approval was granted, HTC filed its Notice of Intent to file for a rate increase with the Hawaii PUC on June 8, 1981. As shown above the requested rate increase in this proceeding is $47,600,000.

One other major concession that the ratepayers and the State of Hawaii gave to HTC in supporting the Agreement between AT&T and HTC was the four year delay in the implementation of a complete rate integration with the other states. The four year delay meant that the *further reduction of rates* in phase III of the FCC plan for rate integration was denied to the ratepayers in Hawaii temporarily. Due to the delay, HTC has been able to obtain the favorable settlement of revenues from AT&T. (See preamble of the Agreement as recited in the footnote to this section.)

From the foregoing, we believe it can be reasonably inferred by the Commission that HTC needed the support of the State to obtain the approval of the FCC and the *favorable* settlement agreement with AT&T. Having obtained that settlement, HTC testified that it filed this rate

increase application because it could not hold back any longer and showed its good faith to the State by not requesting an increase in excess of 100 million dollars which it believed it is entitled to.

The benefit then to the "local" ratepayers for the State's support before the FCC, according to HTC, is that HTC is seeking a rate increase filing in *two installments* of approximately $35 million each.

The recitation of the above facts have been presented to show that a representation was made by HTC that, *in the absence of an agreement,* the local ratepayers would be subjected to rate increases per year of 30-35 million dollars. The State gave its support to the Agreement and HTC did obtain its agreement but HTC nevertheless filed, after the support had been given and before the FCC decision was issued, for another rate increase requesting $47,600,000.

We are not legally certain whether the Commission has any equitable estoppel powers but the Commission, under Section 369-16, H.R.S. does have the power to determine that the rates fixed be "just and reasonable". To insure that rates are "just and reasonable" includes the power to take into consideration the interest of the ratepayers as well as that of the utility owners.

We find from the foregoing that in balancing the interest of the ratepayers and the Company, the consumers would expect reciprocal benefit for the State's support of the Agreement. Full rate integration with lower interstate rates was waived by the consumers for a four year period so that HTC could "Avoid any duly rapid adverse economic impact" from complete rate integration. The ratepayers will temporarily forego the benefit of the last two rate reductions in interstate rates as a result of the Agreement. The representations to the intrastate consumers was that if the Agreement were approved it could "lessen the need to increase local rates" by HTC.

Though the Commission has conceded above that it cannot utilize the transitional supplement revenues as intrastate revenues, we find that it would be totally unjust and unreasonable if HTC after obtaining the benefit of the transitional revenues were *also* to receive the benefit of the lowered intrastate return - the difference between Hawaiian Plan II and the Ozark Separation formulas. To award HTC another 1.1% increase in their return would deprive the ratepayers of any reciprocal benefits resulting from their support of the transitional Agreement. We conclude, as shown in the subject entitled "Revenue Increase Authorized" herein that an appropriate adjustment in the expenses and rate base must be made to insure that rates to be set are "just and reasonable."

[Material Deleted]

[T]he range of the rate of return testified to by the experts is higher than the return percentage that was sought by HTC. HTC, as indicated previously, requested a net operating income of $41,700,000 for this rate case. Our Results of Operations show that HTC will have a net operating income of $41,700,000 and, due to our adjustments, a return of 9.18%. Since HTC requested a specific net operating income and not a specific return, we find that the specific cost of equity and the rate of return issue moot.

The Commission, based on the foregoing, finds that it does not need to make a finding on a specific cost rate for common equity nor for a specific fair rate of return for the test year 1982. Since the evidence that was presented does show that HTC is at least entitled to the

return granted herein, the issue of what a fair rate of return is moot in this proceeding.

SEPARATIONS

In the Company's last rate case, the Commission determined that HTC's investment in plant, equipment, and expenses must be "separated" or allocated between its interstate and intrastate operations in order to establish the level of rates for the Company's intrastate operations. Thus, the Commission determined that "separations" is the necessary process of dividing or allocating the properties, revenues, expenses, taxes and reserves of the Company to determine the intrastate or interstate results of operations, rate base and rate of return.

The existing NARUC-FCC Separations Manual, commonly called the Ozark Plan was made applicable to Hawaii by order of the Federal Communications Commission (the FCC) and the Federal-State Joint Board dated June 29, 1981 in FCC Docket No. 21263. The Application of the manual to Hawaii was a prerequisite to Hawaii's entry into the nationwide interstate toll division of revenue pool and the eventual integration of rates for toll services between Hawaii and the mainland. It is also a result of the agreement between AT&T and HTC as discussed herein previously.

The CA accepted HTC's original intrastate separations allocation percentages, which were based on the application of the Ozark Separations Plan.

Although the CA used the separations factors originally developed by HTC based upon the Ozark Separations Plan, the CA did not revise said factors to reflect the most current action by the FCC's freezing of the subscriber plant factors (SPF) at the 1981 level.

The SPF is the factor used to apportion nontraffic sensitive plant between State and interstate operations. The

use of a frozen SPF is in accord with FCC Decision and Order dated February 26, 1982 in Docket No. 80-286, which adopted the Joint Board's recommendation to freeze SPF at the average annual 1981 level effective April 2, 1982. We believe that known changes should be considered in the test year results of operations to set reasonable rates for the future. Therefore, the revised separations factors as proposed by HTC, including the freezing of SPF, should be used for this case.

[Material Deleted]

REVENUE INCREASE AUTHORIZED

As previously discussed herein, in conjunction with the Transitional Supplement, the immediate result from switching from Hawaiian Plan II to Ozark reduced the intrastate rate of return from 5.1% to 4.0%. The rate of return and results of operations under both separations plans, as shown in Exhibit No. 1 attached hereto, are a result of applying the separation factors to each expense and plant account. In order to reflect the necessary adjustment to intrastate for the test year, the separations under both Hawaiian Plan II and Ozark Plan should have been applied to all of the expense and rate base items that we have decided fair and reasonable herein. This, however, would be an unnecessary academic exercise because the end result which is a composite difference of 1.1% in the rates of return would be approximately the same. We therefore believe that the adjustment of 1.1% on the intrastate rate base is fair and reasonable for the test year. Accordingly, we find that a $4,993,000 adjustment (1.1% of an intrastate rate base of 4454,129,000) is reasonable.

Since we have decided to base our decision on what is necessary to produce $41,700,000 net operating income and since we have also decided to make an adjustment for the change from Hawaiian Plan II to the Ozark Plan, HTC is authorized to increase its revenues by $27,121,000. Exhibit 8 attached hereto and made a part hereof shows

the derivation of how we arrived at our decision authorizing the $27,121,000 based on HTC's method of determining the amount of gross revenues required to achieve a $41,700,000 net operating income. Exhibit No. 9 attached hereto and made a part hereof shows the results of operations without any adjustment for the change in separations plans while exhibit 10 shows the results of operations with an adjustment for the change from Hawaiian Plan II to Ozark Plan.

REVENUE INCREASE AUTHORIZED

Based upon the entire record in this proceeding, the Commission approves an increase of $27,121,000 in the intrastate revenue requirements of HTC. This increase, we firmly believe, should pay for operating and other expenses, maintain credit, attract capital and provide for reasonable dividends and additions to surplus, and permit the Company to obtain the necessary capital it needs on reasonable terms.

NEW RATES

The new rate schedules to be attached hereto as Exhibit No. 11 and made a part hereof, and the rates and charges set forth therein, are hereby found to be just and reasonable.

BASED ON THE ENTIRE RECORD AND THE FOREGOING FINDINGS OF FACT, THE COMMISSION HEREBY MAKES THE FOLLOWING ULTIMATE FINDINGS AND CONCLUSIONS OF LAW:

1. After due notice to all concerned and in accordance with law, public hearings have been held in Docket No. 4306, an agency hearing has been held, evidence has been submitted, the Commission is fully informed, and all matters in Docket No. 4306 stand submitted.

2. For purposes of this proceeding, the Commission finds that jurisdictional separations are required by law and that the procedures specified in the Ozark Plan as proposed by the Company are reasonable.

3. The test year for the purpose of this proceeding is the calendar year 1982.

4. The intrastate operating revenues, and intrastate operating expenses and taxes, as set forth in Exhibit No. 10, attached hereto and made a part hereof, are found to be just and reasonable for the purposes of determining the amount of increase to be allowed.

5. The intrastate rate base for test year 1982 is found to be $454,129,000.

6. Under existing rates, the Company's earnings for test year 1982 would provide a rate of return of 6.4% on the intrastate rate base. (See Exhibit No. 10)

7. The use of HTC's parent company weighted cost of capital as HTC's cost of common equity is unreasonable. The Company's proposed capital structure is abnormal and is therefore unreasonable for ratemaking purposes. A reasonable capital structure for HTC would be the average capital structure for GTE's domestic telephone operating companies.

8. The rate of return for the Company on its intrastate rate base for test year 1982 is 9.18%.

9. The Company is granted a rate increase which will produce an annual revenue increase of $27,121,000.

10. The annualized rate increase will produce a net operating income of $41,700,000 which was requested by HTC.

11. The issue of what a fair return for HTC on its properties actually used and useful for public utility purposes is moot in this proceeding.

12. The tariff proposals creating separate, unbundled telephone instrument charges, and a 5-tier service connection charge, are just and reasonable.

13. HTC's proposed across-the-board increase and the allocation of the revenue requirements to the designated schedules is unreasonable and unduly discriminatory between schedules.

14. The new rate schedules to be attached hereto as Exhibit No. 11 and made a part hereof and the rates and charges therein are just and reasonable.

15. The increased rates and charges authorized herein are just, reasonable and nondiscriminatory and passes through to customers only increased costs to HTC for the services or commodities furnished by it.

16. That each of the specific findings of fact hereinbefore made is hereby adopted as ultimate findings and conclusions of law by the Commission.

ORDER

WHEREFORE, GOOD CAUSE APPEARING THEREFORE, IT IS HEREBY ORDERED THAT:

1. The new rate schedules attached hereto as Exhibit No. 11, and made a part hereof, shall become effective on and after FEBRUARY 6, 1983.

2. HTC shall provide to the Commission the new intrastate schedules reflecting the increases authorized herein and in accordance with the findings made herein. The revised rate schedules shall be served on the parties and shall be filed with the Commission by FEBRUARY 2, 1983.

DONE at Honolulu, Hawaii, this 26th day of January, 1983.

PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

By /s/Albert Tom
Albert Tom, Chairman

By /s/Sundao Kido
Sunao Kido, Commissioner

APPROVED AS TO FORM:
/s/Harry S. Y. Kim
HARRY S. Y. KIM
Commission Counsel

DOCKET NO. 4306
HAWAIIAN TELEPHONE COMPANY

COMPARISON OF RESULTS OF OPERATIONS
UNDER OZARK AND HAWAIIAN PLAN II
($000)

	Ozark[1]	Hawaiian Plan II[2]
1. Operating Revenues		
a. Local Service	$136,611	$136,611
b. Toll Service	31,874	31,874
c. Miscellaneous	22,150	22,150
d. Total Operating Revenues	-1,200	-1,200
	$189,435	$189,435
2. Operating Expenses		
a. Maintenance	54,502	50,226
b. Traffic	6,997	6,997
c. Commercial—Advertising & Sales	4,466	4,466
d. Commercial—Other	16,054	16,054
e. General Office—Customer Accounting	2,981	2,981
f. General Office—Engineering	1,115	1,042
g. General Office—Other	9,260	8,752
h. Other Expenses—Insurance & Damage	378	354
i. Other Expenses—Operating Rents	2,635	2,465
j. Other Expenses—Reliefs & Pensions	15,991	15,115
k. Other Expenses—Earth Station	—	—
l. Other Expenses—General Svcs. & Pensions	2,862	2,797
m. Other Expenses—Other	898	839
n. Other Expenses—Expense (Credit)	(1,954)	(1,847)
o. Subtotal	$116,185	$110,281

[Exhibit 1 continued on next page]

	Ozark[1]	Hawaiian Plan II[2]
p. Depreciation and Amortization	$ 50,206	$ 46,735
q. Total Operating Expenses	$166,391	$157,016
3. Net Operating Income	$ 23,044	$ 32,419
4. Taxes	$ 3,085	$ 9,300
5. Net Operating Income	$ 19,239	$ 23,119
6. Rate Base	$485,181	$454,544
7. Return on Rate Base	4.0%	5.1%

[1] HTC-502

[2] HTC-1R-7

DOCKET NO. 4306
HAWAIIAN TELEPHONE COMPANY

INCREASE NECESSARY TO PRODUCE $41,700,000 NET INTRASTATE OPERATING INCOME*

($000)

Net Operating Income Required		$41,700
Net Operating Income Under Present Rates With Adjustment For Change In Separation Plan:		
Net under Present Rates	$23,913	
Adjustment For Change In Separation Plan**	4,995	
		$28,908
Increase In Net Operating Income Required		$12,792
Gross Revenue Factor	.47166	
Gross Revenue Allowed		$27,121

* Same Method Per HTC-1902

** 1.1% of Intrastate Rate Base = .011 x 454,129 = $4,995

EXHIBIT NO. 8

DOCKET NO. 4306
HAWAIIAN TELEPHONE COMPANY

RESULTS OF OPERATIONS AT PRESENT RATES WITHOUT ADJUSTMENT FOR CHANGE IN SEPARATIONS PLAN

($000)

	Total Company	% Separation	Intrastate
Revenues:			
Local Service	$136,687		$136,611
Toll Service	206,554		31,874
Miscellaneous	26,634		22,150
Uncollectibles	(3,714)	18.9	(702)
Total Operating Revenues	$366,161		$189,933
Expenses & Taxes:			
Maintenance	$ 81,487	68.5	$ 55,819
Traffic	11,439	51.2	5,857
Commercial Expense	20,492	76.2	15,615
Marketing Expense	6,034	56.4	3,403
Advertising	1,146	56.4	646
Engineering	2,144	68.8	1,475
General Office Salaries & Expenses	17,074	67.6	11,542
Other Expenses:			
—Insurance & Damage	549	68.9	378
—Operating Results	11,462	23.3	2,671
—Relief & Pensions	20,136	66.8	13,451
—Earth Station	584	-0-	—
—General Services & License	3,330	58.9	1,961
—Other	646	68.8	444

[Exhibit 9 continued on next page]

	Total Company	% Separation	Intrastate
—Management Salaries & Accrued Vacation Adjustment	(1,555)	68.8	(1,070)
—Non Labor Inflation Adjustment	(366)	68.8	(252)
—GTEDS Clearing Account Adjustment	(136)	68.8	(94)
—Expenses Charged to Construction	(3,492)	66.8	(2,333)
Depreciation & Amortization	66,911	69.9	46,771
Operating Taxes Other Than Income Taxes	21,063		15,346
Total Operating Expenses & Taxes	$258,948		$171,630
Operating Income Before Income Taxes	$107,213		$ 18,303
Income Taxes	32,583		(5,610)
Net Operating Income	$ 74,630		$ 23,913
Rate Base	$651,108		$454,129
Rate of Return	11.46%		5.27%

EXHIBIT NO. 9

DOCKET NO. 4306
HAWAIIAN TELEPHONE COMPANY

INTRASTATE RESULTS OF OPERATIONS WITH INCREASE TO PRODUCE HTC'S REQUEST NET OPERATING INCOME
TEST YEAR 1982

($000)

	Present Revenues	Increase	Adopted Revenues
Revenues:			
Local Service, Toll &			
Miscellaneous Revenues	$190,635	$27,121	$217,756
Uncollectibles	(702)		(946)
Total Operating Revenues	$189,933		$216,810
Expenses & Taxes:			
Maintenance	$ 55,819		$ 55,819
Traffic	5,857		5,817
Commercial Expense	15,615		15,615
Marketing Expense	3,403		3,403
Advertising	646		646
Engineering	1,475		1,475
General Office Salaries &			
Expenses	11,542		11,542
Other Expenses:			
—Insurance & Damage	378		378
—Operating Results	2,671		2,671
—Relief & Pensions	13,451		13,451
—General Services & License	1,961		1,961
—Other	444		444
—Management Salaries &			
Accrued Vacation			
Adjustment	(1,070)		(1,070)

[Exhibit 10 continued on next page]

	Present Revenues	Increase	Adopted Revenues
—Non Labor Inflation Adjustment	(252)		(252)
—GTEDS Clearing Account Adjustment	(94)		(94)
—Expenses Charged to Construction	(2,333)		(2,333)
Depreciation & Amortization	46,771		46,771
Operating Taxes Other Than Income Taxes	15,346		17,009
Total Operating Expenses & Taxes	$171,630		$173,294
Operating Income Before Income Taxes	$ 18,303		$ 43,516
Income Taxes	(5,610)		6,811
Net Operating Income Before Adjustment	$ 23,913		$ 36,705
Adjustment For Change In Separations Plan	4,995		$ 4,995
Adjusted Net Operating Income	28,908		41,700
Rate Base	$454,129		$454,129
Rate of Return	6.4%		9.18%

EXHIBIT NO. 10

DISSENT OF COMMISSIONER CLYDE S. DuPONT

I must respectfully dissent from my colleagues in their decision in Docket No. 4306, a request by the Hawaiian Telephone Company for approval of rate increase and revised rate schedules. I disagree with my colleagues on several critical points. These are of such importance that I believe the Commission's decision is legally flawed.

In brief they are:

1. The use of Net Operating Income as the beginning point for computing the ultimate award in this case and because of Commission changes in expenses, taxes and revenues, the refusal to initially find a fair rate of return for the Company as required by H.R.S. 269-16(b).

2. The backdoor use of interstate revenues to meet the Commission's intrastate revenue goal.

3. Apparent prejudgment.

4. The inordinate amount of time—over seventeen months—taken to decide this case. Although not in technical violation of the nine-month time period mandated for public utility rate cases by H.R.S. 269-16(c), I believe it does violate the spirit of the law.

An elaboration of each of the above points follows. *The Net Operating Income Fallacy and Rate of Return*

The Commission's decision in this docket is confused and makes a critical error by first establishing a target Net Operating Income figure of $41,700,000 for its award and then working backwards through expenses and taxes to gross operating revenues. This is completely contrary to the usual procedure followed in rate cases in this and other jurisdictions on the Federal and State levels.

The normal and usual procedure in all regulatory jurisdictions with which I am familiar is for the regulatory body to first find a rate base and fair rate of return for

the applying utility and then move on to expenses and other issues.

The Company, in this docket, requested a total operating revenue amount of $234,693,000[1] at proposed rates, or an increase of approximately $47,600,000.[2] This works out to an imputed rate of return of 8.9 percent[3] on a rate base of $483,5414,000.[4] The Company makes the point in its presentation that the $47,600,000 is less than half the amount it believes it is entitled to—$101,000,000.[5] The reason given for requesting the lower figure is that management has judged the lower figure to be sufficient to meet the immediate needs of the Company as a whole taking into consideration the revenues the Company receives through transitional supplement payments for interstate operations.[6]

Hawaiian Telephone Company Exhibit 1900—the 1982 Intrastate Results of Operation statement supporting the Company's request—contains a Net Operating Income figure, after deducting expenses and taxes, of $41,699,000. It is this $41,689,000 amount—rounded to $41,700,000—that the Commission, throughout its decision and summarized in Exhibit No. 8, indicates it is awarding the Company. However, the Commission injects confusion into its reasoning by stating on Page 15 of its decision, "We conclude that in the final analysis, the Company's revenue requirements shall be limited to *either* a revenue increase of $47,600,000 or a net income of $41,700,000." If the Commission was indeed awarding the Company the $47,600,000 Total Operating Revenue amount it requested

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[1] Docket No. 43069, HTC R-2701

[2] Id., HTC 1902

[3] Id., HTC R-27, p. 2

[4] Id., HTC R-2702

[5] Id., HTC R-27, p. 8

[6] Id.

this part of my dissent would not be as broad. However, that is not the case but rather the Commission's decision only awards the $41,700,000 Net Operating Income. So in fact, the above "either or" statement is not true. The Commission is not awarding the Company $47,600,000 but rather $41,700,000—the above quoted statement from the Commission's decision notwithstanding.

Since the Commission has chosen to change many of the expense figures, the rate base and the taxes as estimated by the Company, it is illogical to assume the same Net Operating Income figure of $41,700,000, calculated by the Company, is valid under the Commission's estimates and will be realized in actual Company operations. When drastic changes in expenses, rate base and taxes are made the effect on the resulting net operating income, under efficient and prudent management, is obvious. When you change expenses, rate base and taxes you get a different net operating income. To believe otherwise is to ignore the realities of the business world. This is exactly what the majority has done.

Even a cursory reading of the Commission's decision shows that the majority settled on a target Net Operating Income amount of $41,700,000 for the Company and then worked backwards through expenses injecting what may very well be characterized as "plug figures" to justify its target net operating income amount. The Commission then strained further, as its decision Exhibit No. 8 shows, by reaching into the interstate revenue till to meet the intrastate revenue goal it set for the Company—an action in violation of the separations principles which is the bedrock of interstate/intrastate telephone regulation. Under the guise of an "adjustment for Change in Separation Plan" the majority took $4,995,000 of interstate revenues, deducted it from the $41,700,000 Net Operating Income goal it set, applied the gross revenue factor of .47166 submitted by the Company and concluded that the resultant $27,121,000 is the increase in additional Gross Revenue

Allowed the Company will receive by their decision. Again, in this context, I state that reality completely refutes the Commission's claim that its method will produce $47,600,000 Total Operating Income from its $27,121,000 ordered increase.

This procedure of first deciding on a target Net Operating Income amount and then working backwards through taxes and expenses is contrary to all usual regulatory rate cases processes. Because the Commission did not agree with the Company's figures and changed expenses, taxes and rate base drastically, the Commission would have better served itself, the Company and the public by meeting the Company's request head on following the normal procedures for public utility rate cases.

The Commission had several alternatives available to it. It could have started from the usual beginning by deciding on a rate base and a rate of return; or, it could have begun its deliberations using the $47,600,000 total operating revenues requested by the Company; or, something more similar to what the Company did, the Commission could have begun by using the $101,000,000 which the Company maintained it was legally entitled to at the requested rate of return. This last alternative is mentioned because the Company stated in its testimony that it had reduced its filing of $47,600,000 from $101,000,000 because of the Company/State transitional supplemental agreement of 1980-81. Any of these alternatives would have been preferable to the procedure the Commission did follow in reaching its decision in this docket. Working back as it did from the $41,700,000, then making its own expense projections and adding the approximately $5,000,000 of interstate revenues to meet its intrastate revenue requirement—ostensibly, because of the change over in separation from Hawaiian Plan II to the Ozark Plan—the Commission makes it virtually impossible under efficient and prudent management for the Hawaiian Telephone

Company to obtain a fair rate of return on its intrastate operations.

As to a specific rate of return, six witnesses addressed the subject in this case. Three witnesses were presented by the Hawaiian Telephone Company, two by the Consumer Advocate and one by the Defense Department. The lowest rate of return recommended was by the CA's witness and she recommended an 11.3 percent rate of return. This only serves to emphasize the need for this Commission to have proceeded in its decision-making process following a more normal regulatory procedure.

If the Commission was not going to accept the Company's figures then it must start from a point which appears much earlier than "Net Operating Income" in the Company's operating statement. The rate of return which would have ultimately been decided upon is not in question, but the procedure and lack of meaningful consideration is. I am of this opinion, particularly, in view of the provision in H.R.S. 269-16(b) directing this Commission to provide in its decision for ". . . a fair return on the property of the utility actually used or useful for public utility purposes." This provision of law together with the long history in regulatory proceedings interpreting such provisions of law to mean the finding of a rate of return leads me to conclude that failure to do so constitutes legal error.

Of equal concern is the effect the Commission's decision in awarding $27,121,000, or $41,700,000, to the Company will have on the Company's bond rating which is set by the rating agencies in New York. Rate change awards and the timeliness of rate decisions obviously have an effect on bond ratings. The absence of a finding of a fair rate of return and the reduction in the award being given to Hawaiian Telephone Company in the Commission's decision can only have an adverse effect on the Company's bond rating. How adverse will have to await the next tendering of bonds by the Company. At the present time HTC has

an Aa rating with Moody's and AA+ with Standard and Poor's.[7] Should the Company's bond ratings drop it is the Hawaii ratepayer who will have to foot the bill through increased debt service expenses. Admittedly, the financial condition of the whole company—intrastate and interstate operations—is considered by the bond rating companies, but the intrastate regulatory awards and climate are of primary concern to these agencies. A substantive deterioration of both, rates and regulatory climate, will be taken into consideration by Moody's and Standard and Poor's. It is this kind of balancing act that makes our task as regulators so important and difficult.

Backdoor Use of Interstate Revenues

It is a long standing order in telephon[e] regulation that interstate and intrastate investment, expenses, revenues, taxes and reserves be kept separate and apart.[8] By authority of the interstate commerce clause of the Constitution of the United States the Federal government through the Federal Communications Commission regulates interstate telephone operations. Residually, state public utility commissions regulate intrastate operations. The obvious reason for this bifurcation is the joint use of certain telephone equipment for interstate and intrastate services.

This joint usage of equipment necessitated the formulation of a method by which the allocation of investment, expenses, revenue, taxes and reserves could be made fairly between the interstate and intrastate ratepayers. The fact that the FCC regulated interstate operations while the state commissions regulated intrastate operations complicated the situation. The FCC, because its constituency was

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[7] Docket No. 4306, HTC T-16, pg. 15

[8] R. Gabel, DEVELOPMENT OF SEPARATIONS PRINCIPLES IN THE TELEPHONE INDUSTRY, Michigan State University, East Lansing, Michigan (1967).

interstate ratepayers, sought to keep interstate telephone rates down while the state regulators sought to keep intrastate rates low.

To resolve this conflict separations plans which allocated investment, expenses, revenues, taxes and reserves between the two systems were adopted by the FCC through the years and codified, successively, in Part ~~67 of~~ the FCC rules. The current plan, commonly referred to as the Ozark Plan, was adopted in 1970 in a meeting of the National Association of Regulatory Utility Commissions held at Lake of Ozarks, Missouri—hence, the name Ozark. Until 1981, Hawaii, Alaska and Puerto Rico were recognized as having peculiar problems caused by their insularity and they were exempted from the separations plans applicable to the 48 continuous states. Since no separations plans existed for Hawaii, Alaska and Puerto Rico, the operating companies in those respective jurisdictions negotiated settlements, on interstate revenues only, with AT&T, the company having control over interstate telephone services.

For several years prior to 1981 the State of Hawaii had been pressing for rate integration between Hawaii and her mainland sister states. The FCC in 1977 issued a Notice of Inquiry and Proposed Rulemaking to determine what changes, if any, should be made in the then existing separations procedures applicable to the 48 contiguous states for the inclusion of Alaska and Hawaii. A FCC-State Commission Joint Board was then convened to conduct this inquiry. The membership of that joint board included Hawaii PUC Chairman Albert Tom. Upon the recommendation of the Board the FCC in its Order No. 29693 in Docket No. 21263 adopted as of June 20, 1981, made the Ozark national separations plan applicable to Hawaii and Alaska. Also included in that FCC order was what has commonly been referred to as a transitional supplement which phased out over a period of four years—to January 1, 1985—the payments received by the Hawaiian Telephone Company under the 1980 revenue settlements

agreement with AT&T. This was to alleviate the anticipated reduction in overall earnings the Company would experience because of the applicability of Ozark to Hawaii. Essentially, Ozark transferred some rate base expenses from interstate to intrastate operations decreasing the intrastate rate of return by approximately 1.1 percent or $41,995,000 according to Commission calculations. The Company had maintained in the FCC proceeding and before the PUC that the negotiated settlements with AT&T helped to keep intrastate rates lower.

In Hawaii PUC Docket No. 2595, which was initially docketed on January 3, 1975, the Hawaiian Telephone Company submitted a separations plan which allowed the Hawaii PUC the opportunity to decide whether separations of interstate and intrastate operations should be made for jurisdictional purposes and the basis for such separations. In that case, the PUC in effect proposed that the PUC regulate both interstate and intrastate operations of the Hawaiian Telephone Company by setting intrastate rates on a "whole" company basis. Such a ruling would have resulted in commingling interstate and intrastate investment, expenses, revenues, taxes and reserves. This would have been contrary to the principles of separations and the Commission so ruled.

In this docket, the CA pressed a similar point. Although the Commission rejected that proposal of the CA,[9] it has through the back door, itself used interstate revenues to meet the Commission's intrastate revenue requirement—exactly what the CA had recommended. The majority has done this by injecting the argument that the changeover from Hawaiian Plan II to Ozark worked to the detriment of the intrastate ratepayers and for "just and reasonable"[10] purposes they would make a 1.1 percent adjustment

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[9] PUC Decision Docket 4306, p. 28

[10] Id., p. 28

in rate bass. That action, no matter how characterized, results in using interstate revenues for intrastate operations. That is not allowable under the principles of separation. In addition, it is illogical since the Commission earlier in its decision rejected such action by denying the CA's proposal on the subject.

The Commission seeks to bolster its position by arguing that the Company made no showing in this docket that minutes of usage had changed and since minutes of usage was the driving force for separations allocations they, in effect, would not go along with the Ozark formula results. During the hearing in this docket the Company admitted, and maintains in its brief, that it has no authority to change the allocations dictated by the Ozark Plan.[11] Simiilarly, the Consumer Advocate's policy witness, Mr. William Milks, was asked on cross-examination whether the Company could allocate expenses other than in accordance with Ozark, to which he answered, "Clearly Not."[12] Obviously, the Company and the CA in this case had a clear understanding of the separations principle. This same prohibition applies to the Commission. Whether the allocation comes about because of Ozark or the settlement agreement, the revenue in question is interstate revenue. This Commission cannot change the allocations nor the effect of such allocations just because it does not now like the results. Such action is not within this Commission's authority.

Prejudgment

From my reading of the majority's decision, a primary reason for making the 1.1 percent adjustment on the intrastate rate base thus using interstate revenues to meet their intrastate revenue goal is an agreement between the Company and the State of Hawaii reached in 1980. The

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[11] Docket 4306, HTC Opening Brief, p. 59

[12] Id., Tr. p. 1567

majority goes to great length in their decision to analyze the exchange of letters and negotiations between the Hawaiian Telephone Company and the State of Hawaii leading up to state support for the transitional supplement before the FCC, and the fact that, in their view, the Company violated that agreement.

At the time the FCC was considering making Ozark applicable to Hawaii the Company was seeking to have the FCC allow a gradual phase-out of the revenue supplement received by HTC from AT&T—to January 1, 1985—if Ozark was adopted for Hawaii. To persuade the FCC to allow for a gradual phase-out of the revenue supplement the Company sought the support of the Governor of Hawaii and Hawaii's members of Congress.

HTC Exhibit 110 contains copies of correspondence between Hawaii's elected officials, Hawaiian Telephone Company officers and the FCC on the subject. Similarly, HTC T-1, the testimony of Mr. Lee Toole, Hawaiian Telephone's policy witness in this case and Vice President for Revenue Requirements, contains references to the exchange of correspondence and negotiations regarding the proposed FCC action.

The copy of Governor Ariyoshi's July 31, 1980, letter to Mr. Donald M. Kuyper, President of Hawaiian Telephone, contained in HTC Exhibit 110 certainly indicates the deep concern the Governor had regarding the interests and benefits that would inure to Hawaii's telephone ratepayers if a transitional supplement was adopted by the FCC with its Ozark Order. Similarly, Mr. Kuyper's August 10, 1981, reply to Governor Ariyoshi indicated that he shared the same concern and does make representations that the Company would take those concerns into consideration in deciding on future rate filings.

I am certain that it was in response to the support given by Governor Ariyoshi and Hawaii's congressional delegation, as well as the other evidence submitted, that the

FCC did approve the transitional supplement from AT&T to HTC. Returning to the majority's interpretation of the agreement between Hawaiian Telephone and the State of Hawaii, particularly in their use of the phrase reciprocal benefits[13] in referring to the agreement, I have attempted to glean exactly what the majority saw as the pledge from the Hawaiian Telephone Company. Clearly, the State's part of the agreement was to support the transitional supplement before the FCC. In its discussion of the transitional supplement on Page 27, the majority states its understanding of what the Company said would happen if it did *not* receive the transitional supplement—the Company would have to seek rate increase of between "... 30-35 million dollars". However, the majority does not say what they expected of the Company if it *did* receive the transitional supplement. The majority's "reciprocal benefit" to the ratepayers is not stated anywhere in their discussion. It might be that the majority believes the entire transitional supplement should be deducted from the $47,600,000, but that was the CA's proposal which the Commission rejected earlier in its decision.[14] Then, it might be that the majority believes the "reciprocal benefit" should be the limiting of the rate Application as filed to "30-35 million dollars", but the majority, on Pages 26 and 27 of their decision, seems to reject that alternative. Another possibility is that the majority believes the Company agreed to forbear from filing for any increase at all until the phase-out period of the revenue settlement ended—January 1, 1985—or maybe some date closer to January 1, 1985. The Commission's decision, as I read it, is completely silent on this point.

I was not privy to any of the negotiations that went on between the Company and the State of Hawaii nor was I present at any of the meetings where the exchange of

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[13] PUC Docket 4306 decision, p. 28

[14] Id., p. 22

letters or their effect was discussed. However, from my reading of the letters in HTC Exhibit 110, I conclude that the Company did say that it would take the interests of the Hawaii telephone users into consideration in any contemplated future rate filings. I also believe that the Company is of the opinion that by not seeking the $101,000,000 it feels it was legally entitled to in this proceeding but rather filing for $47,600,000, it was keeping its side of the agreement. This is recited in HTC T-1, Page 14, and in the Company's opening brief.[15] If the "reciprocal benefit" question was of such import—as it appears to be from a reading of the majority decision—I believe that Mr. Kuyper and Mr. Toole, both of whom appeared as witnesses in this case, should have been questioned in greater detail regarding this matter. Also, maybe this Commission should have initially focused on the reduction from $101,000,000 to $47,600,000, rather than the $41,700,000, as the starting point in this case.

Aproaching this matter from a different aspect, and this is what gives me concern in this section of my dissent, just for the sake of argument, assume that the majority's construction of the events is correct. That construction, of course, being that the Company did violate the agreement is made with the State by filing for a rate increase in August, 1981, albeit for $47,600,000 rather than for $101,000,000. This is not the proper forum nor the proper approach to take to correct this problem. What transpired between the Company and the State appears to be a political problem not within the purview or authority of this regulatory commission to correct. It is a political question to be resolved in a non-regulatory forum.

Returning again to the Commission's statements on this subject, its decision on Page 28 states:

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[15] Docket No. 4306, HTC Opening Brief, p. 3

> Though the Commission has conceded above that it cannot utilize the transitional supplement revenues as intrastate revenues, we find that it would be totally unjust and unreasonable if HTC after obtaining the benefit of the transitional revenues were *also* to receive the benefit of the lowered intrastate return—the difference between Hawaiian Plan II and the Ozark Separations formulas. To award HTC another 1.1% increase in their return would deprive the ratepayers of any reciprocal benefits resulting from their support of the transitional Agreement.

The only inference I can draw from this statement and what immediately preceded is that there existed a prejudgment regarding the outcome of this case even before it was litigated. It appears that no matter what the Company filed for, because it sought a rate increase of the magnitude it did and prior to 1985, it was in violation of its agreement with the State. As a result, this Commission was not going to approve the amount requested. That smacks of prejudgment and is not in keeping with the required objectivity of this Commission or any other similar quasijudicial regulatory body. Such actions go to the very heart of the administrative law process. In this vein, it is identical to the responsibilities imposed on judicial tribunals. Certainly the knowledge, expertise and experience of the commissioners must play a role in their decision-making but at the beginning of each case every party, including the applicant, must come before this regulatory body with a slate clean of judgments. With all due respect to my esteemed colleagues, my reading of the Commission's reasoning on this subject persuades me otherwise, and I must disagree with them on this point.

Regulatory Delay and Temporary Rate Increases

Although not of the same legal import as the preceding points I believe regulatory delay and denial of temporary rate requests have great practical adverse effect on the Company, this Commission and the public. Therefore, I am constrained to comment on the more than seventeen-month time period taken to complete this case, particularly when considering Section 269-16(d) of the Hawaii Revised Statutes which states:

> (d) The commission shall make every effort to complete its deliberations and issue its decision as expeditiously as possible and before nine months from the date the public utility filed its completed application; provided that in carrying out this mandate the commission shall require all parties to a proceeding to comply strictly with procedural time schedules which it establishes. If a decision is rendered after the nine month period, the commission shall in writing report the reasons therefor to the Legislature within thirty days after rendering the decision.

Although no sanctions or other actions are directed by law when the Commission fails to meet the mandated nine-month time period, the urgent need to complete a rate case within the nine months is obvious. This Commission uses a forward looking test year in its cases on which all parties focus. The testimony, data base, effective rates, revenues and other supporting evidence are all forecasted to take effect in that test period. The test year cannot be too far forward otherwise it becomes to much of a guess and takes its toll on accuracy. On the other hand, it must be far enough into the future to allow the basic theory for having a forward test year—that the new rates be effectively for the entire test year—be realized. Both sides of the equation, having accurate forecasted data and making possible the effectiveness of the new rates in the test

year, take on added importance during these times of depressed economic conditions and tight budgets.

When a decision is issued beyond the test year, as is the case in this docket, for all intents and purposes the submitted data forecasts, estimates and plans of the applicant, the interveners and the Commission diminish in reliability and accuracy. The degree to which such data become less reliable and less accurate depends on the economic forces at work not only in the community directly involved but also nationally and possibly internationally. The larger geographical areas are included because all utilities, as with other large business entities, must compete on the open market for funds. This applies to both stocks and bonds, although with Hawaiian Telephone since it is a wholly-owned subsidiary of GT&E, at the present time only sells bonds. If a company needs additional funds from outside sources national and international financial and economic conditions do effect its efforts. More directly, the failure to issue a timely decision in a rate case works adversely to the company's internal operations and the services it renders and plans to render to the public. This is especially true if the award finally settled upon by the commission is significantly lower than that requested. Under such conditions the applicant must consider accelerating its future filings and play "catch up ball".

This is exactly the situation the Commission faces now. On December 28, 1982, the Hawaiian Telephone Company filed for another comprehensive rate increase. There are procedural alternatives available such as "pancaking" the second filing into the first and just updating the data in the first case to conform with the new data in the second case. Pancaking would take additional time but possibly not as long as a completely new case if the issues in the first case are the same as those in the second. But with the issuance of this decision that alternative is not available. Nevertheless, the impact of the regulatory delay in

this docket is being felt by not only the Company but other interested parties as well.

The Company, anticipating that there might be a delay in the issuance of this decision, filed for a temporary rate increase on March 9, 1982. However, with this decision the issue of a temporary rate increase becomes moot, but, hindsight certainly assists us in making judgments now. The course of events in this case may very well necessitate a review of this Commission's procedures to see if anything can or should be done to solve the problem of regulatory delay.

For those who would review this situation I submit the following. In my view, regulatory delay cannot begin to toll until a reasonable time for consideration of all evidence has been completed. All regulatory bodies must adequately consider all of the testimony, exhibits and other evidence presented to it in a rate case. Obviously, some time must be involved in the process to insure that the requirements of due process are met. Therefore, as a regulator I do not count that time period as regulatory delay. It is only when the realm of reasonableness is exceeded that I would begin the count of regulatory delay.

Drawing primarily on my experience as a regulatory on the Federal level, given the cooperation of counsel, witnesses and adequate staff, the nine-month time period stated in H.R.S. 269-16(d) is sufficient to complete a case of the magnitude of Docket No. 4306. The experience I cite covered a period of seven years and involved chairing five postal rate cases, approximately 20 fairly large mail classification cases and several complaint cases. Each of the rate cases were requests for at least $4.3 billion in additional revenue for the Postal Service; involved at least 57 interveners and 63 witnesses per case; and, the transcript record in each of the cases exceeded 14,000 pages with an additional 1,000 to 2,000 pages of exhibits not included in the transcript. The issues in those rate cases

were every bit as complicated as those in this docket and all of them were completed in less than ten months.

I am of the firm belief that this Commission's rate cases can be completed in a shorter period of time. What is more important, the law and the times mandate it. As a public service agency, this Commission must issue its decisions expeditiously giving due regard to fairness to all parties and the ratepaying public. Looking at the number of rate cases facing this Commission in the remainder of this year makes it even more imperative that regulatory delay be eliminated.

DONE at Honolulu, Hawaii, this 26th day of January, 1983.

/s/CLYDE S. DUPONT
Clyde S. DuPont,
Commissioner

APPENDIX I

Filed March 13, 1985
JUDGMENT IN A CIVIL CASE

United States District Court

HAWAIIAN TELEPHONE COMPANY

v.

PUBLIC UTILITIES COMMISSION, et al

DISTRICT—HAWAII

DOCKET NUMBER 84-1306

NAME OF JUDGE OR MAGISTRATE
SAMUEL P. KING

Decision by Court. This action came to hearing before the Court with the judge (magistrate) named above presiding. The issues have been heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

that Permanent Injunction is GRANTED in favor of plaintiff and against defendants and defendant-intervenor.

cc: all attys of record

/s/WALTER A.Y.H. CHINN

Mar. 13, 1985

APPENDIX J

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII

CIVIL NO. 84-1306

JUDGMENT FOR PERMANENT INJUNCTION

HAWAIIAN TELEPHONE COMPANY,
a Hawaii corporation,

Plaintiff,

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF HAWAII; ALBERT TOM, Chairman; SUNAO KIDO, Commissioner; and CLYDE S. DUPONT, Commissioner,

Defendants.

Filed March 28, 1985

JUDGMENT FOR PERMANENT INJUNCTION

This matter came on for trial on March 12, 1985, on the Plaintiff's Complaint for a permanent injunction. The Court has considered the evidence adduced by the parties at the trial, the affidavits and evidence submitted for the hearing on Plaintiff's Motion for Preliminary Injunction which were made part of the record on the trial, and the pleadings and argument of counsel. In accordance with its Decision Granting Permanent Injunction herein, rendered on March 13, 1985, which also re-adopted the statements, findings of fact, and conclusions of law set forth in the Court's Decision rendered December 26, 1984 and Order Granting Preliminary Injunction entered January 8, 1985, the court finds as follows:

1. By Report and Order adopted June 29, 1981 and released July 8, 1981 in Docket No. 21263 (Report and Order 81-312), the Federal Communications commission ("FCC") ordered that the federal Separations Manual (based on what is referred to as the "Ozark Plan") "shall apply to Hawaii."

2. Plaintiff HAWAIIAN TELEPHONE COMPANY ("HTC") has filed a complaint requesting a permanent injunction against defendants PUBLIC UTILITIES COMMISSION and the PUBLIC UTILITIES COMMISSIONERS (collectively "PUC" herein) under 47 U.S.C. §401(b), which reads in part:

> If any person fails or neglects to obey any order of the [Federal Communications] Commission . . . any party injured thereby . . . may apply to the appropriate district court of the United States for the enforcement of such order. If, after hearing, that court determines that the order was regularly made and duly served, and that the person is in disobedience of the same, the court shall enforce obedience to such order by a writ of injunction or other proper process, mandatory or otherwise. . . .

3. The above-referenced FCC Report and Order in Docket No. 21263 is an "order" which was "regularly made" and the PUC is a "person," all within the meaning of those words as used in 47 U.S.C. §401(b).

4. The June 29, 1981 FCC Report and Order in Docket No. 21263 referenced above is applicable to and binding upon the PUC for purposes of jurisdictional separations procedures in setting intrastate rates.

5. In its August 14, 1984 Decision and Order No. 8042 in docket No. 4588, the PUC established intrastate telephone rates for HTC's regulated services.

6. The PUC in Decision and Order No. 8042 made an adjustment to HTC's revenue requirement, based on a 1.1% computational factor, which resulted in a reduction of $10,507,000 in the rate increase granted to Plaintiff. Said adjustment is shown on Exhibit 4 to the Decision and Order.

7. The PUC denies that, in making its adjustment, it failed to apply the Ozark Plan as required by FCC Report and Order 81-312. The PUC states in Decision and Order No. 8042:

> . . . .the commission . . . did not shift intrastate expenses to interstate and the Commission did not adopt Hawaiian Plan II as the basis for separations. . . . The Commission made an *appropriate adjustment* to provide reciprocal benefits to the ratepayers as a result of the State of Hawaii's, and in turn the ratepayers' support of the transitional agreement between HTC and AT&T. In making the appropriate adjustment the commission merely took the difference in rates of return between Hawaiian Plan II and the Ozark Plan *as a basis of measurement* and applied the percentage difference to HTC's intrastate rate base. In so doing the annual cost or dollar return became a reduction in a cost or expense item in the determination of revenue requirements. We must emphasize again that the Commission made an "appropriate adjustment" and made no shift in expenses from intrastate to interstate. . . .

8. The transitional agreement referred to above was between HTC and AT&T and was supported by the State of Hawaii through its Governor. The agreement resulted in a transitional supplement payable to HTC by AT&T, as described in Decision and Order No. 8042:

> The origin of the transitional supplement issue begins with the FCC decision in [FCC] Docket

No. 21263, the purpose of which was to determine whether, and how Hawaii-Mainland telephone rates could be integrated into the nationwide toll rate structure without unduly burdening Hawaii intrastate ratepayers. Previous to the FCC decisions, the Hawaii-Mainland calls were approximately three times the rates for calls of corresponding distances on the mainland. Revenues from Hawaii-Mainland calls were split in approximate correspondence to the costs incurred by HTC and AT&T. With the proposed integration, the reduction of two-thirds in rates and an immediate imposition of the mainland separations/settlements procedure would result in a severe contraction of revenues to HTC and a consequent increase in revenue burden for HTC intrastate subscribers.

In view of the potential impact, both HTC and the State Government sought some modification of the separations formula so that the rate integration would not burden HTC's intrastate ratepayers. Both parties stressed the unique characteristics of Hawaiian service and argued for modification to the nationwide separations plan which would shift somewhat more revenue responsibility from the intrastate to the interstate jurisdiction.

As a result, a joint agreement between HTC and AT&T proposed that the 1971 NARUC-FCC *Separations Manual* would be applied, unadjusted, to HTC's operations for purposes of jurisdictional separations. Revenue settlements, however, would be based on the conventional separations/settlements procedure plus a transitional supplement payment reflecting differing splits each year in the growth in revenue since the base year 1979. Finally, the agreement deferred the

final step of rate integration until January 1, 1985.

. . . .

In *In Re Hawaiian Telephone Company,* Decision and Order No. 7412, Docket No. 4306 (January 1983) we stated that:

> Though the Commission has conceded . . . *that it cannot utilize the transitional supplement revenues as intrastate revenues,* we find that it would be totally unjust and unreasonable if HTC after obtaining the benefit of the transitional revenues were also to receive the benefit of the lowered intrastate return—the difference between Hawaiian Plan II and the Ozark Separation formulas. to award HTC another 1.1% increase in their return would deprive the ratepayers of any reciprocal benefits resulting from their support of the transitional Agreement. We conclude, as shown in the subject entitled "Revenue Increase authorized" herein that an *appropriate adjustment* in the expenses and rate base must be made to insure that rates to be set are "just and reasonable." (Emphasis added.)

9. At trial, the PUC's witness testified that separations calculations in PUC Docket No. 4588 were made according to the federally-mandated Ozark Plan and that calculations according to Hawaiian Plan II were never made (and have not yet been made) in that docket. Therefore, the PUC argues, the 1.1% "adjustment" that was made in PUC Docket No. 4588 cannot be said to have been derived solely from a comparison between the Ozark Plan and Hawaiian Plan II.

10. However, while no new separations calculations based on Hawaiian Plan II were made in connection with PUC Docket No. 4588, the 1.1% "adjustment" made in PUC Docket No. 4588 was carried over from PUC Docket

No. 4306 in which such a comparison was made. In Exhibit No. 1 to PUC docket No. 4306, the 1.1% difference in Return on Rate Base between the results obtained under the Ozark Plan (4.0%) and the results obtained under Hawaiian Plan II (5.1%) is developed explicitly. Exhibit No. 8 to PUC Docket No. 4306 then shows an "Adjustment for change in Separation Plan" calculated as "1.1% of Intrastate Rate Base = .011 x 454,129 = $4,995" by which amount the "Increase In Net Operating Income Required" is additionally reduced.

11. The 1.1% from PUC Docket No. 4306 was carried over to PUC docket No. 4588, although without identifying the item as an "Adjustment for change in Separation Plan." Instead the PUC stated, at page 14 of its Decision and Order No. 8042, that the 1.1% adjustment, having already been found to be fair and reasonable in PUC Docket No. 4306, would be applied again in PUC Docket No. 4588.

12. PUC Docket No. 4588 immediately succeeded PUC Docket No. 4306. No separate basis for reaching an "adjustment" of 1.1% in PUC docket No. 4588 is given other than the calculations set forth in Exhibit No. 1 to PUC Docket No. 4306.

13. Notwithstanding the PUC's disclaimer of any such action, the PUC's action had the effect of applying Hawaiian Plan II (a different separations method) instead of the Ozark Plan as a basis for separations. The so-called "appropriate adjustment" made by the PUC in Docket No. 4588 was calculated solely and precisely on the difference between the Hawaiian Plan II and Ozark Separations formulas.

14. Because the PUC's 1.1% "appropriate adjustment" in Docket No. 4588 was directly the product of applying Hawaiian Plan II for purposes of separations, the PUC thereby failed and neglected to obey FCC Order 81-312,

which required the application of the federal Separations Manual.

15. The declared purpose behind the PUC adjustment is to have Hawaii intrastate ratepayers share in the transitional supplement received by HTC under the HTC-AT&T agreement approved by the FC in 1981. Yet presumably Hawaii intrastate ratepayers have received some benefit from that agreement by a slowing down of increases in intrastate rates. Furthermore, that agreement, and supplements under the agreement, terminated on December 31, 1984. The rates set in PUC docket No. 4588, however, remain in place indefinitely until modified in another future proceeding before the PUC.

16. There may well be other matters besides the results obtained through the application of separations formulas which a public utilities commission may consider in rate determinations. Here, however, the PUC has not articulated any reason for its action other than the existence of the transitional supplement, which the PUC specifically held in its Docket No. 4588 decision could not be considered to be intrastate revenue.

17. Res judicata does not bar the present action; PUC Docket No. 4588 is a different application from the earlier PUC Docket No. 4306, which was appealed to and affirmed by the Supreme Court of Hawaii on September 10, 1984.

18. The Johnson Act, 28 U.S.C. §1342, by its own terms applies only when jurisdiction is founded *solely* on diversity of citizenship or repugnance to the Federal Constitution. Here, HTC's claim arises under 47 U.S.C. §401(b).

19. The eleventh Amendment does not bar injunctive relief against actions by State officials that contravene federal statutes or the Federal Constitution.

20. The federal statutory remedy provided by 47 U.S.C. §401(b), if available in other respects, is not defeated by the existence of an adequate state judicial remedy.

WHEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

1. The preliminary injunction heretofore granted by Order entered January 8, 1985 is hereby made permanent;

2. Defendants PUBLIC UTILITIES COMMISSION and the PUBLIC UTILITIES COMMISSIONERS be and they hereby are permanently enjoined and restrained from failing and neglecting to obey FCC Order 81-312, adopted in Docket No. 21263 on June 29, 1981, released July 8, 1981;

3. The PUC, as heretofore ordered, shall made effective schedules of intrastate rates for HTC sufficient to generate additional revenues of $10,507,000 based on the test year employed by the PUC in Docket No. 4588;

4. Each party shall bear its own costs and attorney's fees.

DATED: Honolulu, Hawaii, March 28, 1985

/s/SAMUEL P. KING
United States District Judge

APPENDIX K

Supreme Court of the United States

No. A-424

PUBLIC UTILITIES COMMISSION OF HAWAII, et al.,
Applicants,

v.

HAWAIIAN TELEPHONE COMPANY, etc.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for the applicants,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including January 9, 1988.

/s/SANDRA D. O'CONNOR
Associate Justice of the Supreme Court of the United States

Dated this 27th
day of November, 1987.

APPENDIX L

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

CIVIL NO. 84 1306

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF; SUMMONS

[Filed November 2, 1984]

HAWAIIAN TELEPHONE COMPANY,
a Hawaii Corporation,

Plaintiff,

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF HAWAII; ALBERT TOM, Chairman; SUNAO KIDO, Commissioner; and CLYDE S. DUPONT, Commissioner,

Defendants.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiff HAWAIIAN TELEPHONE COMPANY, for its Complaint for Declaratory and Injunctive Relief against defendants, alleges and avers as follows:

1. Plaintiff HAWAIIAN TELEPHONE COMPANY is a corporation organized and existing under the laws of the State of Hawaii, having its principal place of business at 1177 Bishop Street, Honolulu, Hawaii.

2. The Plaintiff furnishes telephone and certain other communications services throughout the State of Hawaii ("intrastate service"), between Hawaii and the continental United States, and between Hawaii and numerous overseas points.

3. Pursuant to the Communications Act of 1934, as amended, 47 U.S.C. § 151 *et seq.*, the Federal Communications Commission ("the FCC") has exclusive jurisdiction over the Plaintiff's interstate and foreign services (herein jointly referred to as "interstate service").

4. The Public Utilities Commission of the State of Hawaii ("the PUC"), consisting of three Commissioners, is a state agency established by and existing under and by virtue of the provisions of Chapter 269, Hawaii Revised Statutes ("H.R.S."). The PUC has authority to regulate the intrastate public utility rates and services of the Plaintiff insofar as such regulation is permitted under the constitution and laws of the United States. The PUC is placed within the Department of Budget and Finance of the State of Hawaii for administrative purposes.

5. Defendant ALBERT TOM is the Chairman of the PUC and is a resident of the State of Hawaii.

6. Defendant SUNAO KIDO is a Commissioner of the PUC and is a resident of the State of Hawaii.

7. Defendant CLYDE S. DuPONT is a Commissioner of the PUC and is a resident of the State of Hawaii. Commissioner DuPONT dissented from the action of the PUC which is the subject of this complaint and is made a defendant in this action solely for the purpose of bringing all Commissioners before the Court.

8. Separations is the process by which telephone property, revenues, and expenses are separated (that is, assigned and/or allocated) between the interstate jurisdiction which is the exclusive province of the FCC and the intrastate jurisdictions which are the province of State regulatory commissions. Separations is necessary because much of the telephone plant of companies such as the Plaintiff is used in common for both interstate and intrastate services.

9. Issues relating to jurisdictional separations are subject to a comprehensive and pervasive federal regulatory scheme in recognition of the need for a uniform, nationwide method of separations applied by federal and state authorities.

10. The current jurisdictional separations procedures used throughout the United States are prescribed in the February, 1971 edition of the NARUC-FCC Separations Manual, as amended, which incorporates what is commonly referred to as the Ozark Plan (herein referred to as the "Separations Manual" or "Ozark Plan"). The Separations Manual is published under joint authorship of the National Association of Regulatory Utility Commissioners ("NARUC") and the FCC, and is codified in Part 67 of the FCC Rules and Regulations.

11. By Report and Order adopted June 29, 1981 and released July 8, 1981 in docket No. 21263 (FCC 81-312) (herein referred to as "Report and Order 81-312"), the FCC ordered that the Separations Manual "SHALL APPLY to Hawaii and Alaska", and such Order has continued in effect thereafter.

12. The Application of the Separations Manual to Hawaii was ordered by the FCC pursuant to the recommendation of a Federal-State Joint Board convened by the FCC pursuant to 47 U.S.C. § 410(c) consisting of Commissioners from the FCC, Hawaii, Alaska, and California.

13. Report and Order 81-312 was regularly made by the FCC, was duly served on the PUC, and was published in the Federal Register for July 28, 1981 (46 Fed. Reg. 38516). The PUC has had actual knowledge of Report and Order 81-312 at all relevant times herein.

14. The authority of the PUC to adopt, establish or use separations procedures different from those established by the FCC has been preempted by federal law.

15. On December 30, 1982, the Plaintiff filed an Application for approval of intrastate rate increase and of revised rate schedules designed to produce such increase in PUC Docket No. 4588. The Plaintiff cannot increase its intrastate utility rates without the approval of the PUC.

16. On August 14, 1984, the PUC issued its final Decision and Order No. 8042 in Docket No. 4588 ("D&O 8042"), authorizing the Plaintiff a permanent intrastate rate increase of $20,333,000, substantially less than the requested increase of $82,368,000.

17. Revised rate schedules approved by the PUC to implement the rate increase became effective August 25, 1984 and are still in effect.

18. In its final decision, the PUC determined that an intrastate rate increase of $30,840,000 was necessary to yield the 11.25% return on intrastate rate base found to be fair by the PUC, but reduced the amount of the rate increase to $20,333,000 by a $10,507,000 adjustment ("the PUC's adjustment").

19. The amount of the PUC's adjustment was calculated by the PUC based on the difference between using the Separations Manual and the PUC's own separations plan ("Hawaiian Plan II") to separate property, revenues and expenses between the Plaintiff's interstate and intrastate operations. The PUC's adjustment assigned $10,507,000 of intrastate revenue requirement to the Plaintiff's interstate operations.

20. The PUC's adjustment contradicts the FCC-ordered Separations Manual, and directly violates the FCC's Report and Order 81-312.

21. As result of the PUC's unlawful action, the Plaintiff has suffered and continues to suffer a loss in excess of $200,000 per week and has already suffered a loss in excess of $2,000,000.

22. The claims asserted in this Complaint arise under the Communications Act of 1934, as amended, 47 U.S.C. § 151 *et seq.;* 42 U.S.C. § 1983; and the Constitution of the United States. Jurisdiction is conferred on this Court by 28 U.S.C. §§ 1331, 1337(a), 1343, 2201 & 2202 and 47 U.S.C. § 401(b).

23. This action is a case of actual controversy between Plaintiff and defendants which arises under the Constitution and laws of the United States and may be finally adjudicated as between the parties.

24. Venue lies in this judicial district where all defendants reside and in which the claims arise under 28 U.S.C. § 1391(b).

COUNT I

25. This Count alleges a claim by Plaintiff to enforce an order of the FCC against the PUC pursuant to Section 401(b) of the Communications Act of 1934, 47 U.S.C. § 401(b), and 28 U.S.C. §§ 1331 and 1337(a).

26. Plaintiff realleges and incorporates herein by reference the allegations set forth in paragraphs 1 through 24 above.

27. By Report and Order 81-312 adopted in 1981 and continually in effect thereafter, the FCC has ordered that the Separations Manual shall apply to Hawaii.

28. The FCC's Report and Order was regularly made by the FCC and duly served on the PUC in accordance with the FCC's rules and regulations.

29. The PUC participated on the Federal-State Joint Board that recommended the action taken by the FCC.

30. In setting Plaintiff's rates in PUC Docket No. 4588, the PUC deliberately did not follow the Separations Manual, thereby violating the Order of the FCC applying the Separations Manual to Hawaii.

31. As a result of the PUC's failure to obey the Order of the FCC, the Plaintiff has suffered a loss in excess of $200,000 per week since August 25, 1984 and will continue to suffer such loss and will be irreparably harmed unless Defendants are restrained or enjoined from further disobedience of such order.

32. Plaintiff has no adequate, speedy remedy at law. Under the express terms of 47 U.S.C. § 401(b), the Plaintiff is entitled to and the Court should issue "a writ of injunction or other proper process, mandatory or otherwise" to restrain the defendants from further disobedience of the FCC's Order.

COUNT II

33. This Count alleges a claim by Plaintiff that the PUC's violation of the FCC-prescribed Separations Manual in setting intrastate rates unreasonably interferes with and unduly burdens interstate commerce in violation of Article I, Section 8, clause 3 of the Constitution of the United States, and of the Communications Act of 1934, as amended, 47 U.S.C. § 151 *et seq.*

34. Plaintiff realleges and incorporates by reference the allegations set forth in paragraphs 1 though 24 and 27 through 32 above.

35. Article I, Section 8, clause 3 of the Constitution reserves to Congress the right to regulate commerce among the several states.

36. Pursuant to the Communication's Act of 1934, as amended, 47 U.S.C. § 151 *et seq.*, Congress has provided the FCC with exclusive jurisdiction over interstate telecommunications services, and with authority to establish separations procedures to be applied by both the FCC and state regulatory authorities.

37. Pursuant to such authority, the FCC has ordered the application of the Separations Manual in Hawaii, and

the PUC is preempted from deviating from the Separations Manual in setting intrastate rates.

38. The PUC's adjustment constitutes a violation of the FCC-prescribed Separations Manual.

39. The PUC's failure to adhere to the Separations Manual in setting Plaintiff's intrastate rates in Docket No. 4588 has the effect of using *inter*state income and revenue to subsidize the Plaintiff's *intra*state rates.

40. The PUC's failure to adhere to the Separations Manual directly interferes with the intent of Congress and the FCC to provide for a uniform, nationwide separations methodology as part of the goal of making available a rapid, efficient, nationwide communications service.

41. The PUC's failure to adhere to the Separations Manual, and the resulting cross-subsidization of intrastate service by interstate income and revenue, discourages investment and expenditures for facilities jointly used in the provision of interstate and intrastate service and thereby unreasonably interferes with and unduly burdens interstate commerce.

42. As a result of the foregoing, Plaintiff has no adequate remedy at law and is suffering, and will continue to suffer, great and irreparable loss, and, therefore, is compelled to seek equitable relief in this Court.

COUNT III

43. This Count alleges a claim by Plaintiff for declaratory and injunctive relief under 28 U.S.C. §§ 1331, 1337(a), 2201 & 2202.

44. Plaintiff realleges and incorporates by reference the allegations set forth in paragraphs 1 through 24, 27 through 32, and 35 through 41 above.

45. A controversy has arisen between Plaintiff and the defendants regarding the constitutionality and validity of

the PUC's adjustment so as to necessitate a declaration by this Court of the validity of the PUC's action.

46. The PUC's adjustment violates the FCC-prescribed Separations Manual and is invalid and unconstitutional for the following reasons:

(A) Such action violates FCC Report and Order 81-312;

(B) Such action violates Article VI, clause 2 of the Constitution of the United States (the Supremacy Clause); and

(C) Such action unreasonably interferes with and unduly burdens interstate commerce in violation of Article I, Section 8, clause 3 of the Constitution of the United States (the Commerce Clause).

47. As a result of the foregoing, Plaintiff has no adequate remedy at law and is suffering, and will continue to suffer, great and irreparable loss, and therefore, is compelled to seek equitable relief in this Court.

COUNT IV

48. This Count alleges a claim by Plaintiff arising under 42 U.S.C. § 1983 and 28 U.S.C. § 1343.

49. Plaintiff realleges and incorporates herein by reference the allegations set forth in paragraphs 1 through 47 above.

50. Each and all of the acts of defendants ALBERT TOM and SUNAO KIDO were done by such defendants under the color and pretense of the statutes, regulations customs, and usages of the State of Hawaii, and under the authority of their office as Commissioners of the PUC.

51. Such defendants, acting under color of state law, have subjected Plaintiff or caused Plaintiff to be subjected to the deprivation of its rights, privileges or immunities secured by the Constitution and laws of the United States.

52. The conduct of defendants ALBERT TOM and SUNAO KIDO has deprived Plaintiff of rights secured by Article VI, clause 2; Article I, Section 8, clause 2; and the Fourteenth Amendment of the United States Constitution and by the Communications Act of 1934, as amended, 47 U.S.C § 151 *et seq.*

53. As a result of the foregoing, Plaintiff has no adequate remedy at law and is suffering, and will continue to suffer, great and irreparable loss, and, therefore, is compelled to seek equitable relief in this Court.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully demands judgment as follows:

1. That Defendants be enjoined during the pendency of this action and permanently from setting intrastate rates other than on the basis of the FCC-prescribed Separations Manual.

2. That Defendants be ordered to:

(A) Comply strictly with the FCC's Report and Order 81-312 and follow the FCC-prescribed Separations Manual, without adjustment, in setting the rates for Plaintiff's intrastate service; and

(B) Place into effect schedules of rates sufficient to generate the increased revenue requirement of $10,507,000 resulting from application of the FC-prescribed Separations Manual, without adjustment, based on the test year used in *Re Hawaiian Telephone Co.,* Docket No. 4588.

3. That the Court enter judgment declaring that the PUC's adjustment is unlawful and in violation of the FCC-prescribed Separations Manual.

4. That Plaintiff have such other and further relief as this Court deems just and proper.

DATED: Honolulu, Hawaii, November 2, 1984.

/s/DONALD J. ENGLEMAN

DONALD J. ENGLEMAN
THOMAS W. WILLIAMS, JR.
Attorneys for Plaintiff
HAWAIIAN TELEPHONE
COMPANY

APPENDIX M

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

CIVIL NO. 84-1306

INTERVENOR'S ANSWER

[Filed November 21, 1984]

HAWAIIAN TELEPHONE COMPANY,
a Hawaii corporation,

Plaintiff,

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF HAWAII;
et al.

Defendants,

and

CONSUMER ADVOCATE, the Director of the Department of Commerce and Consumer Affairs, State of Hawaii,

Applicant for Intervention.

INTERVENOR'S ANSWER

COMES NOW Intervenor the Consumer Advocate, Russell Nagata, Director of the Department of Commerce and Consumer Affairs, State of Hawaii (hereinafter "Intervenor") for answer to the complaint for Delcaratory and Injunctive Relief ("Complaint") herein and alleges as follows:

FIRST DEFENSE: (Admissions and Denials.)

1. Intervenor admits the allegations in paragraphs 1, 2, 3 and 4.

2. In answer to paragraphs 5, 6 and 7, Intervenor admits that ALBERT TOM is the Chairman of the Public Utilities Commission (hereinafter "PUC") and that SUNAO KIDO and CLYDE S. DuPONT are Commissioners of the PUC, but is without sufficient knowledge or information to form a belief as to the truth of all other allegations and on that basis denies all other allegations contained in paragraphs 5, 6 and 7.

3. In answer to paragraph 8, Intervenor admits that separations is a process to assign or allocate telephone property, revenues and expenses between interstate and intrastate jurisdictions, but denies that it is within the exclusive province of the FCC.

4. Intervenor denies paragraph 9.

5. In answer to paragraph 10, Intervenor admits that the Ozark Plan is the currently prescribed separations procedures used throughout the United States for interstate ratemaking purposes, with the exception that Plaintiff Hawaiian Telephone has been and will be receiving transitional supplement revenues which are over and above the uniform cost-based settlements determined in accordance with the Ozark Plan, for the period 1981 through 1984. Intervenor denies that the Ozark Plan must be used for intrastate ratemaking purposes.

6. In answer to paragraphs 11 and 12, Intervenor responds that FCC Report and Order 81-312 speaks for itself but denies that the Hawaii PUC is required, by virtue of said order, to apply the Ozark Plan for intrastate ratemaking purposes.

7. In answer to paragraph 13, Intervenor admits that Report and Order 81-312 was published in the Federal Register but is without sufficient knowledge or information to form a belief as to the truth of the other allegations contained in paragraph 13 and on that basis denies said allegations.

8. Intervenor denies paragraph 14.

9. Intervenor admits paragraph 15.

10. Intervenor denies the allegations in paragraphs 16, 17 and 18 on the basis that the PUC subsequently issued an Order Granting Motion for Reconsideration in Part and Denying Motion For Reconsideration in Part in Docket No. 4588 (Order No. 8168, issued November 15, 1984).

11. In answer to paragraph 19, the order of the PUC speaks for itself and on that basis Intervenor denies the allegations contained in paragraph 19.

12. Intervenor denies paragraphs 20, 21, 22 and 23.

13. Intervenor denies paragraph 24 on the basis that it is based on the allegations made in paragraphs 20, 21, 22 and 23, which paragraphs have been denied by Intervenor.

23. Intervenor denies paragraphs 36, 37, 38, 39, 40, 41 and 42.

24. Paragraph 43 is an introductory statement to which no response is called for; however, to the extent deemed necessary, Intervenor denies the allegations contained in paragraph 43.

25. In answer to paragraph 44, Intervenor realleges and incorporates by reference the answers in paragraphs 1 through 13, 16 through 19, 22 and 23 above.

26. Intervenor denies paragraphs 45, 46 and 47.

27. Paragraph 48 is an introductory statement to which no response is called for; however, to the extent deemed necessary, Intervenor denies the allegations contained in paragraph 48.

28. In answer to paragraph 49, Intervenor realleges and incorporates by reference the answers in paragraphs 1 through 26 above.

29. In answer to paragraph 50, Intervenor admits that defendants ALBERT TOM and SUNAO KIDO have acted

in their official capacity as Commissioners of the PUC and that PUC Docket No. 4588 was adjudicated by the PUC in accordance with law, but Intervenor is without sufficient knowledge and information to form a belief as to the truth of all other allegations contained in paragraph 50 and, on that basis, denies said allegations.

30. Intervenor denies paragraphs 51, 52 and 53.

31. As to any other allegations not specifically admitted herein, Intervenor denies the same.

SECOND DEFENSE

32. The Complaint fails to state a claim upon which relief can be granted.

THIRD DEFENSE

33. This Court lacks jurisdiction over the subject matter of this civil action.

FOURTH DEFENSE

34. Plaintiff's claim is barred by estoppel and waiver.

FIFTH DEFENSE

35. The State of Hawaii has not waived sovereign immunity and has not consented to be sued.

WHEREFORE, Intervenor the CONSUMER ADVOCATE prays for dismissal of the Complaint and such other and further relief as this Court deems just and proper.

DATED: Honolulu, Hawaii, November 20, 1984.

MICHAEL A. LILLY
Attorney General
State of Hawaii

By /s/RONALD SHIGEKANE
RONALD SHIGEKANE
PATRICIA CROWE
Deputy Attorneys General

Attorneys for the Consumer Advocate

APPENDIX N

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

CIVIL NO. 84-1306

DEFENDANTS' ANSWER

[Filed November 23, 1984]

HAWAIIAN TELEPHONE COMPANY, a Hawaii Corporation,
Plaintiff,

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF HAWAII:
et al.
Defendants,
and

CONSUMER ADVOCATE, the Director of the Department of Commerce and Consumer Affairs, State of Hawaii,
Applicant for Intervention.

DEFENDANTS' ANSWER

COMES NOW Public Utilities Commission, Department of Budget and Finance, State of Hawaii, Albert Tom, Chairman, Sunao Kido, Commissioner ("Defendants hereinafter") for answer to the Complaint for Declaratory and Injunctive Relief ("Complaint") herein and allege as follows:

FIRST DEFENSE: (Admissions and Denials.)

1. Defendants admit the allegations in paragraphs 1, 2, 3, 4, 5, 6 and 7.

2. In answer to paragraphs 8 and 9, Defendants admit that separations is a process to assign or allocate telephone

property, revenues and expenses between interstate and intrastate jurisdictions, but is without sufficient knowledge and information as to the truth of all other allegations.

3. In answer to paragraph 10, Defendants admit that the Ozark Plan is the currently prescribed separations procedures used throughout the United States for interstate ratemaking purposes, with the exception that Plaintiff Hawaiian Telephone has been and will be receiving transitional supplement revenues which are over and above the uniform cost-based settlements determined in accordance with the Ozark Plan, for the period 1981 through 1984. Defendants deny that the Ozark Plan must be used for intrastate ratemaking purposes.

4. In answer to paragraphs 11 and 12, Defendants state that FCC Report and Order 81-312 speaks for itself and deny that the Hawaii Public Utilities Commission ("PUC" herein) is required, by virtue of said order, to apply the Ozark Plan for intrastate ratemaking purposes.

5. In answer to paragraph 13, Defendants admit that Report and Order 81-312 was published in the Federal Register but is without sufficient knowledge or information to form a belief as to the truth of all other allegations.

6. Defendants deny paragraph 14.

7. Defendants admit paragraph 15.

8. Defendants deny the allegations in paragraphs 16, 17 and 18 since the PUC subsequently issued the final Order Granting Motion for Reconsideration in Part and Denying Motion For Reconsideration in Part in Docket No. 4588 (Order No. 8168, issued November 15, 1984).

9. In answer to paragraph 19, the order of the PUC speaks for itself and Defendants deny all other allegations.

10. Defendant deny paragraphs 20, 21, 22, 23, 24 and 25.

11. In answer to paragraph 26, Defendants reallege and incorporate by reference the answers in paragraphs 1 through 24 above.

12. In answer to paragraphs 27 and 28, Defendants state that Report and Order 81-312 speaks for itself and deny that the order requires the PUC to set intrastate rates in accordance with the Ozark Plan.

13. Defendants deny the allegations contained in paragraphs 29, 30, 31, 32 and 33.

14. In answer to paragraph 34, Defendants reallege and incorporate by reference the answers in paragraphs 1 through 32 above.

15. In answer to paragraph 35, Defendants state that Article I, Section 8, clause 3 of the Constitution speaks for itself.

16. Defendants deny paragraphs 36, 37, 38, 39, 40, 41, 42 and 43.

17. In answer to paragraph 44, Defendants reallege and incorporate by reference the answers in paragraphs 1 through 42 above.

18. Defendants deny paragraphs 45, 46, 47 and 48.

19. In answer to paragraph 49, Defendants reallege and incorporate by reference the answers in paragraphs 1 through 47 above.

20. In answer to paragraph 50, Defendants' ALBERT TOM AND SUNAO KIDO have acted in their official capacity as Chairman and Commissioner of the PUC and that PUC Docket No. 4588 was adjudicated by the PUC in accordance with law and deny all other allegations.

21. Defendants deny paragraphs 51, 52 and 53.

22. As to any other allegations not specifically admitted herein, Defendants deny said allegations.

SECOND DEFENSE

23. The Complaint fails to state a claim upon which relief can be granted.

THIRD DEFENSE

24. This Court lacks jurisdiction over the subject matter of this civil action.

FOURTH DEFENSE

25. The Johnson Act, 28 U.S.C.A., section 1342 prohibits federal courts to review any order affecting rates chargeable by a public utility and made by a state administrative agency.

FIFTH DEFENSE

26. Plaintiff's claim is barred by res judicata, estoppel and waiver.

SIXTH DEFENSE

27. Plaintiff has a plain, speedy, and efficient remedy at law in the state court.

SEVENTH DEFENSE

28. The State of Hawaii has not waived sovereign immunity and has not consented to be sued.

WHEREFORE, Defendants pray for dismissal of the Complaint and such other and further relief as this Honorable Court deems just and proper.

DATED: Honolulu, Hawaii, November 23, 1984.

By /s/ HARRY S.Y. KIM
HARRY S. Y. KIM

Attorney for the Public Utilities
Commission, State of Hawaii,
Chairman Albert Tom, Commissioner
Sunao Kido

APPENDIX O

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

CIVIL NO. 84-1306

[Filed November 29, 1984]

HAWAIIAN TELEPHONE COMPANY, a Hawaii Corporation,
Plaintiff,

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF HAWAII: et al.
Defendants,

and

CONSUMER ADVOCATE, the Director of the Department of Commerce and Consumer Affairs, State of Hawaii,
Applicant for Intervention.

MEMORANDUM IN OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION APPENDICES A-F

I. INTRODUCTION

Hawaiian Telephone Company, ("HTC" herein) was awarded an increase in their revenue requirements by the State Public Utilities Commission, ("HPUC" herein) of $20,333,000, pursuant to Decision and Order ("D&O") No. 8042, Docket No. 4588, filed *August 14, 1984.* HTC filed a Motion for Reconsideration of D&O No. 8042 on *August 24, 1984.* HTC appealed D&O No. 8042 and filed its Notice of Appeal to the Hawaii Supreme Court on *September 10, 1984.* On *October 5, 1984* HTC filed another with the PUC

seeking an increase of *$78,300,000* in its rates and charges. HTC then filed this action for Declaratory and Injunctive Relief on *November 2, 1984*. On *November 15, 1984* the PUC granted HTC's Motion for Reconsideration in part and denied its Motion in part. As a result of the PUC's reconsideration decision, HTC was awarded an additional $1,169,000 in Docket No. 4588. HTC finally filed with the Hawaii Supreme Court a Motion to Dismiss Appeal of D&O No. 8042 on *November 21, 1984*. The Motion before the Hawaii Supreme Court is still pending.

II. THE FACTS

HTC is seeking to have this Honorable Court reverse the decision of the HPUC by increasing the present rates and charges of HTC by $10,507,000.* The adjustment of $10,790,000 in the total revenue requirements was made by the HPUC in order to fix "just and reasonable" rates for the intrastate ratepayers in Hawaii. In Docket No. 4588 and in HTC's prior rate case, Docket No. 4306, HTC alleged that the HPUC violated the Federal Communication Commission's ("FCC" herein) separation procedures. In the decisions rendered in both dockets, the HPUC made ultimate findings of fact that the HPUC must legally comply with the FCC separation procedures. The Hawaii Supreme Court affirmed the HPUC findings.

Since HTC is seeking an additional $10,790,000 to the current rates and charges being paid by its subscribers, the relevant facts which led to the decision by the HPUC to make the $10,790,000 adjustment are stated in HPUC's D&O No. 8042. See D&O No. 8042 attached hereto as appendix A.

In D&O No. 8042, the Commission *reaffirmed* its decision previously made in HTC's prior rate case *In Re Hawaiian Telephone Co.*, Docket No. 4306, D&O No. 7412,

---

* The final adjustment amount as stated in HPUC D&O No. 8168, filed November 15, 1984 was $10,790,000.

filed January 26, 1983, to fix just and reasonable intrastate rates by making a transitional adjustment. The facts and reasons for the transitional adjustment are stated in detail in Decision and Order No. 7412. To have a complete understanding of the factual circumstances which led to the HPUC's decision, we refer this Honorable Court to the relevant portions of Decision and Order No. 7412, attached hereto as Appendix B.

HTC appealed Decision and Order No. 7412 to the Hawaii Supreme Court, which appeal included, among others, the issue being raised in this action. The Hawaii Supreme Court rendered its decision on HTC's appeal on September 27, 1984. The Hawaii Supreme Court recited the factual circumstances, as it relates to the FCC separations procedures, *as found in the record in Decision and Order No. 7412, Docket No. 4306,* and held that "the Commission neither varied a formula, method, or procedure decreed by the federal agency nor tampered with interstate rates in any way." We believe the concise statement of facts, as stated by the Hawaii Supreme Court, are the basic facts in this proceeding since HTC presented the same facts and argument in Docket No. 4588 as it did in docket No. 4306. See *In Re Hawaiian Telephone Company,* Sup. Ct. Docket No. 9343, Slip Opinion, (Sept. 27, 1984, Hawaii), attached hereto as appendix C.

III. ARGUMENT

[Material Deleted]

C. HTC's action is barred by the doctrine of res judicata.

As stated in the facts above, the HPUC *reaffirmed* its decision in Decision and Order No. 8042, filed August 14, 1984, that the transitional adjustment made in HRC's previous rate case (Docket No. 4306) was a proper adjustment. After the HPUC decision was rendered in August, 1984

the Hawaii Supreme Court on September 27, 1984 *affirmed* the decision of HPUC that the transitional adjustment decision in Docket No. 4306, Decision and Order No. 7412 was not contrary to federal law. HTC had already taken its appeal to the Hawaii Supreme Court on September 10, 1984 and would not have known the decision of the high court at that time. However, after the Court's decision was rendered, HTC *did not take* an appeal to the United States Supreme Court, as it was entitled to under 28 U.S.C. 1257.

Instead, HTC filed its action for declaratory and injunctive relief on November 2, 1984. *However,* in its Motion to Dismiss, filed November 21, 1984, its Affidavit attached to the Motion stated the following (see Appendix E):

> "1. On November 15, 1984, the Public Utilities Commission of the State of Hawaii issued an order addressing the Appellant's Motion for Reconsideration of Decision and Order No. 8042, which Motion had been pending since August 24, 1984.
>
> 2. The Appellant had planned to bring its appeal herein to question computational errors Appellant believed affected Decision and Order No. 8042, concerning the subjects of capital carrying cost and disallowance of management salary increase.
>
> 3. The Public Utilities Commission's Order No. 8168 of November 15, 1984 makes corrections to account for the aforesaid calculational errors, granting Appellant a limited increase in its rates.
>
> 4. In view of the Public Utilities Commission's recent action and the corrections made by the Commission, dismissal of this appeal is appropriate."

We submit that the doctrine of res judicata is applicable under these facts because HTC has already litigated before the Hawaii Supreme Court the merits of whether the

HPUC violated any federal statutes in its application of the separations procedures in the rate case recently decided. The Hawaii Supreme Court held that the HPUC did not violate any federal laws and affirmed the HPUC decision. HTC's Affidavit in its Motion to Dismiss, filed November 21, 1984 indicates that it *only* wanted to contest the "capital carrying cost and disallowance of management salary increase." It did not inform the Hawaii Supreme Court that it had taken a *separate appeal* to the federal district court to contest the separation procedures utilized by the HPUC and which procedures were held to be reasonable by the Hawaii Supreme Court.

In *Jordan v. Hawaii Government Employees Association*, 472 F. Supp. 1123, 1126-1127 (Hawaii, 1979), the Court stated the following in the doctrine of res judicata:

> " '[W]here [a] federal constitutional claim is based on the same asserted wrong as was the subject of a state action, and where the parties are the same, res judicata will bar the federal constitutional claim whether it was asserted in state court or not, for the reason that the state judgement on the merits serves not only to bar every claim that was raised in state court but also to preclude the assertion of every legal theory or ground for recovery that might have been raised in support of the granting of the desired relief.
>
> *Scoggin v. Schrunk*, 522 F. 2d 436, 437 (9th Cir. 1975) (quoted in *Red Fox v. Red Fox*, 564 F. 2d 361, 363 (9th Cir. 1977). Mr. Jordan has challenged the constitutionality of HPERB's certification of HGEA's fee petition in at least one Hawaii circuit court that has since rendered a decision; thus, he is now precluded from reasserting those issues in this Court."

We submit from the foregoing that HTC having litigated the separation issue before the Hawaii Supreme Court, and not having prevailed, cannot relitigate the same issue as between the same parties before this Honorable Court. HTC's action is barred under the doctrine of res judicata. *See Coogan v. Cincinnati Bar Association,* 431 F. 2d 1209, 1211 (Sixth Cir. 1970).

[Material Deleted]

For the foregoing reasons and authorities, HPUC and Defendants Tom and Kido respectfully request that the Complaint be dismissed in its entirety, preliminary injunction be denied and the Court grant such other relief as may be appropriate under the circumstances.

DATED: Honolulu, Hawaii, November 29, 1984.

Respectfully submitted,

/s/ Harry S. Y. Kim
HARRY S. Y. KIM

Attorney for Hawaii Public
Utilities Commission and
Defendant, Chairman Albert Tom
and Commissioner Sunao Kido

[Exhibit E]

No. 10169

IN THE SUPREME COURT OF THE STATE OF HAWAII

OCTOBER TERM 1985

In the Matter of the Application of

HAWAIIAN TELEPHONE COMPANY

For Approval of Intrastate Rate Increases and Revised Rate Schedules.

PUBLIC UTILITIES COMMISSION DOCKET NO. 4588

APPEAL FROM DECISION AND ORDER NO. 8042
FILED ON AUGUST 14, 1984
FILED
NOV 21 3:54 PM '84
PUBLIC UTILITIES
COMMISSION

MOTION TO DISMISS

ORDER
AFFIDAVIT OF DONALD J. ENGLEMAN
IN SUPPORT OF MOTION

AND

CERTIFICATE OF SERVICE

GOODSILL ANDERSON QUINN & STIFEL
(MARSHALL M. GOODSILL, Attorney, A Law Corporation)

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Attorneys for Appellant
HAWAIIAN TELEPHONE
COMPANY

NO. 10169

IN THE SUPREME COURT OF THE STATE OF HAWAII

OCTOBER TERM 1985

In the Matter of the Application of

HAWAIIAN TELEPHONE COMPANY

For Approval of Intrastate Rate Increases and Revised Rate Schedules.

PUBLIC UTILITIES COMMISSION DOCKET NO. 4588

APPEAL FROM DECISION AND ORDER NO. 8042 FILED ON AUGUST 14, 1984

MOTION TO DISMISS

Pursuant to Rules 27 and 42(b), Hawaii Rules of Appellate Procedure, Appellant HAWAIIAN TELEPHONE COMPANY, by its attorneys, moves this Court to dismiss the Appeal herein. The record of the proceeding below has not yet been transmitted to the Court by the Public Utilities Commission.

This motion is based on the information contained in the attached affidavit.

DATED: Honolulu, Hawaii, November 21, 1984.

/s/ DONALD J. ENGLEMAN
DONALD J. ENGLEMAN
LANI D. H. NAKAZAWA
Attorneys for Appellant
HAWAIIAN TELEPHONE COMPANY

APPROVED AND SO ORDERED:

____

JUSTICE OF THE ABOVE-ENTITLED COURT

NO. 10169

IN THE SUPREME COURT OF THE STATE OF HAWAII

OCTOBER TERM 1985

In the Matter of the Application of

HAWAIIAN TELEPHONE COMPANY

For Approval of Intrastate Rate Increases and Revised Rate Schedules.

PUBLIC UTILITIES COMMISSION DOCKET NO. 4588

APPEAL FROM DECISION AND ORDER NO. 8042 FILED ON AUGUST 14, 1984

AFFIDAVIT OF DONALD J. ENGLEMAN IN SUPPORT OF MOTION

STATE OF HAWAII
ss.
CITY AND COUNTY OF HONOLULU

DONALD J. ENGLEMAN, being first duly sworn on oath, deposes and says:

1. That I am the Vice President-General Counsel of Appellant HAWAIIAN TELEPHONE COMPANY.

2. On September 10, 1984, Appellant filed the subject appeal.

3. On November 15, 1984, the Public Utilities Commission of the State of Hawaii issued an order addressing the Appellant's Motion for Reconsideration of Decision and Order No. 8042, which Motion had been pending since August 24, 1984.

4. The Appellant had planned to bring its appeal herein to question computational errors Appellant believed af-

fected Decision and Order No. 8042, concerning the subjects of capital carrying cost and disallowance of management salary increase.

5. The Public Utilities Commission's Order No. 8168 of November 15, 1984 makes corrections to account for the aforesaid calculational errors, granting Appellant a limited increase in its rates.

6. In view of the Public Utilities Commission's recent action and the corrections made by the Commission, dismissal of this appeal is appropriate.

Further Affiant sayeth naught.

/s/ DONALD J. ENGLEMAN
DONALD J. ENGLEMAN

Subscribed and sworn to before
me this 21st day of November, 1984.
/s/ JULIA TAKATA
NOTARY PUBLIC, State of Hawaii

My commission expires: 3/14/88

APPENDIX P

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

Civil No. 84-1306

MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

[Date: December 17, 1984
Time: 10:00 a.m.
Judge: Hon. Edward Rafeedie]

[Filed November 29, 1987]

HAWAIIAN TELEPHONE COMPANY, a Hawaii corporation,
Plaintiff,

vs.

PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII; et al.,
Defendants.

and

CONSUMER ADVOCATE, the Director of the Department of Commerce and Consumer Affairs, State of Hawaii,
Intervenor.

MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

[Material Deleted]

That the request for a mandatory injunction is raised in derogation of the ratemaking order of an administrative agency charged with the responsibility of promoting the

public interest provides a compelling basis for this Court's denial. As stated by the Supreme Court,

> the extraordinary powers of injunction should be employed to interfere with the action of the state or the depositaries of its delegated powers only when it clearly appears that the weight of convenience is upon the side of the protestant. "Only a case of manifest oppression will justify a federal court in laying such a check upon administrative officers acting colore officii in a conscientious endeavor to fulfill their duty to the state." *Petroleum Exploration, Inc. v. Public Service Commission of Kentucky,* 304 U.S. 209, 222-223 (1938) (Footnotes omitted)

In this connection, even if this Court is not persuaded that the Johnson Act, 28 U.S.C. §1342, prohibits this action, the Consumer Advocate submits that the principles of comity support equitable restraint by this Court because of the direct interference with state utility rate regulation. As noted by the Supreme Court,

> As adequate state court review of an administrative order based upon predominately local factors is available to appellee, intervention of a federal court is not necessary for the protection of federal rights. Equitable relief may be granted only when the District Court, in its sound discretion exercised with the "scrupulous regard for the rightful independence of state governments which should at all times actuate the federal courts," is convinced that the asserted federal right cannot be preserved except by granting the "extraordinary relief of an injunction in the federal courts." *Considering that "[f]ew public interests have a higher claim upon the discretion of a federal chancellor than the avoidance of needless friction with state policies," the usual rule of com-*

ity must govern the exercise of equitable jurisdiction by the District Court in this case. Whatever rights appellee may have are to be pursued through the state courts. (footnotes and citations omitted) (emphasis added)

Alabama Public Service Commission v. Southern Ry. Co., 341 U.S. 341, 349-350 (1951).

[Material Deleted]

Accordingly, the Consumer Advocate strongly recommends this Court's denial of Plaintiff's motion.

DATED: Honolulu, Hawaii, November 29, 1984.

Respectfully submitted,

/s/ RONALD SHIGEKANE
RONALD SHIGEKANE
Deputy Attorney General

Attorney for the Consumer Advocate

APPENDIX Q

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

CIVIL NO. 84-1306

[Filed December 10, 1984]

HAWAIIAN TELEPHONE COMPANY, a Hawaii Corporation,
Plaintiff,

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF HAWAII; ALBERT TOM, Chairman; SUNAO KIDO, Commissioner; and CLYDE S. DUPONT, Commissioner,
Defendants.

REPLY MEMORANDUM

[Material Deleted]

G. This action is not barred by the doctrine of res judicata.

The PUC claims that Plaintiff should be barred from raising the PUC's violation of the FCC's separations requirements in PUC Docket No. 4588 because of the decision of the Hawaii Supreme Court affirming the PUC's decision in the previous rate case, Docket No. 4306. Plaintiff's action is not so barred. Plaintiff is not collaterally "appealing" the Hawaii Supreme Court's decision regarding Docket No. 4306, but is challenging the lawfulness of the PUC's action in Docket No. 4588. The lawfulness of the PUC's action in Docket No. 4588 has not been determined by any Hawaii Court, or by any other court. Therefore, the cases cited by the PUC are inapplicable.

The doctrine of *res judicata* can have no application to different rate setting decisions of public utility commissions. The facts and circumstances that form the basis for one decision have invariably changed when subsequent decisions are rendered. Docket No. 4588 was no exception. The test year revenues, expenses, rate base, and separations results—as well as policy considerations—in Docket No. 4588 were all different from those in Docket No. 4306. See Affidavit of Duane G. Johnson attached to Memorandum in Support of Motion; compare Decision and Order No. 8042 in docket No. 4588 (August 14, 1984) with Decision and Order No. 7412 in Docket No. 4306 (January 26, 1983). The rates approved by the PUC in Docket No. 4588 did not become effective until August, 1984 and will be in effect primarily during a period (on and after January 1, 1985) when the interstate Transitional Supplement (which the PUC cites in support of its separations adjustment) will no longer be in existence. Johnson Testimony, p. 12. Moreover, even the manner in which the PUC implemented the adjustment was different in Docket No. 4588 than it was in Docket No. 4306. Zaretki Testimony, pp. 23-24. Therefore, the general rule that *res judicata* does not apply where facts have changed, *Commissioner* v. *Sunnen,* 333 U.S. 591 (1948), is particularly applicable to rate cases.

The PUC has not cited any authority for the proposition that a question of law erroneously decided by a court in reviewing a rate case determination should be binding in all subsequent rate cases involving the same parties. Yet that would be the result of giving *res judicata* effect to the Hawaii Supreme Court's decision affirming the PUC's decision in Docket No. 4306 in this action, which challenges the PUC's decision in Docket No. 4588. In its opinion, the Hawaii Supreme Court held, as a matter of law, that the PUC could adjust the FCC-prescribed separations procedures to reflect the PUC's own determination of "the relative use of Hawaiian Telephone's facilities." *In re*

Hawaiian Telephone Co., No. 9394, slip op. p. 23 (Sept. 27, 1984). That mistaken view of the law, which directly contradicts federal policy, does not apply forever as the rule of law applicable to Hawaiian Telephone simply because Hawaiian Telephone chose to pursue an appeal in state court in PUC Docket No. 4306.[1]

There is an additional reason why the Hawaii Supreme Court's decision cannot be given *res judicata* effect in this case, brought pursuant to 47 U.S.C. §401(b). The United States District Courts have exclusive jurisdiction over such actions, and considerations of public interest strongly mitigate against issue preclusion based on state court decisions. See *Lyons* vs. *Westinghouse Electric Corp.*, 222 F.2d 184, 189 (2d Cir.), *cert. denied,* 350 U.S. 825 (1955); *Citibank, N.A.* v. *Graphic Scanning Corp.*, 618 F.2d 222, 225 (2d Cir. 1980). The purpose of Section 401(b) is to provide a federal forum for the enforcement of FCC orders by private parties. This enhances the enforcement of a uniform federal policy throughout the several states. That result would not be achieved if the federal courts were bound by inconsistent state court determinations arising out of other cases.

J. Hawaiian Telephone is entitled to a preliminary injunction.

[Material Deleted]

[T]his is not a case where the Court is asked to intervene in resolving a matter predominantly of local concern, as

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[1] The reference of the outset of the PUC's Memorandum to the state court Notice of Appeal filed by Hawaiian Telephone concerning the Docket No. 4588 decision is not complete. The Company filed the notice to protect its right to appeal two computational errors it believed were made by the PUC. The PUC's decision on reconsideration remedied these errors and the Company promptly moved to dismiss the appeal. Counsel is informed the motion to dismiss appeal was granted on December 7, 1984. There was no adjudication on the merits of any issue in the approval of the motion, the record on appeal never having been transmitted.

was the situation in *Alabama Public Service Comm'n* v. *Southern Railway Co.,* 341 U.S. 341 (1951), another case cited by the CA. See *e.g., Canton* v. *Spokane School District #81,* 498 F.2d 840, 845 & n.8 (9th Cir. 1974). There is absolutely no basis for abstention in this case, which is predicated upon federal preemption and enforcement of an order of the FCC. *Illinois Bell Tel. Co.* v. *Illinois Commerce Comm'n,* 740 F.2d 566, 569-570 (7th Cir. 1984); *South Central Bell Tel. Co.* v. *Louisiana Public Service Comm'n, supra.*

Therefore, the CA's suggestion that this Court should stay its own hand, rather than the unlawful action of the PUC, is without merit.

Furthermore, the public interest strongly supports the issuance of a preliminary injunction. Plaintiff is seeking the enforcement of an order of the FCC, which in turn implements a Congressional mandate that there be national uniformity in telecommunications policy. See *Chesapeake & Potomac Tel. Co.* v. *Public Service Comm'n,* 560 F.Supp. 844, 849 (D. Md. 1983). The public interest is furthered by enforcement of the FCC's orders and the implementation of this important policy.

This is not a case where the Plaintiff is seeking to enjoin a state agency's investigation at its threshold, as was the case in *Petroleum Exploration, Inc.* v. *Public Service Comm'n,* 304 U.S. 209 (1934), quoted by the CA in its Memorandum.

The interests of the parties cannot be preserved pending a final decision without the issuance of injunctive relief at this time. The PUC's failure to follow the FCC-prescribed Separations Manual has unlawfully deprived Plaintiff of an annual rate increase in excess of $10,000,000, and its loss to date will have exceeded $3,000,000 by the time of the hearing on this motion. Plaintiff's continuing loss is substantially greater than any foreseeable hardship to others, since any additional revenues collected as a result of a

preliminary injunction will be refunded with interest should Plaintiff not prevail on the merits. The CA does not offer citation of authority for its remarkable and incorrect assertion that this substantial loss of revenue does not constitute irrevocable harm to the Company.

DATED: Honolulu, Hawaii, December 10, 1984.

/s/ Donald J. Engleman

DONALD J. ENGLEMAN
THOMAS W. WILLIAMS, JR.

Attorneys for Plaintiff
HAWAIIAN TELEPHONE COMPANY

APPENDIX R

HAWAII REVISED STATUTES (1985ed.)

CHAPTER 269
PUBLIC UTILITIES COMMISSION

[PART I. PUBLIC UTILITIES, GENERALLY]

§269-1 Definitions. As used in this chapter:

"Public highways" has the meaning defined by section 264-1, including both state and county highways, but operation upon rails shall not be deemed transportation on public highways.

"Public utility" means and includes every person who may own, control, operate, or manage as owner, lessee, trustee, receiver, or otherwise, whether under a franchise, charter, license, articles of association, or otherwise, any plant or equipment, or any part thereof, directly or indirectly for public use, for the transportation of passengers of freight, or the conveyance or transmission of telephone or telegraph messages, or the furnishing of facilities for the transmission of intelligence by electricity by land or water or air within the State, or between points within the State, or for the production, conveyance, transmission, delivery, or furnishing of light, power, heat, cold, water, gas, or oil, or for the storage or warehousing of goods, or the disposal of sewage; provided that the term:

(1) Means and includes any person, insofar as such person owns or operates a private sewer company or sewer facility;

(2) Shall not include any person insofar as such person owns or operates an aerial transportation enterprise;

(3) Shall not include persons owning or operating taxicabs, as defined herein;

(4) Shall not include common carriers transporting only freight on the public highways, unless operating within localities or along routes or between points which the public utilities commission finds to be inadequately serviced without regulation under this chapter;

(5) Shall not include persons engaged in the business of warehousing or storage unless the commission finds that regulation thereof is necessary in the public interest;

(6) Shall not include the business of any carrier by water to the extent that such carrier enters into private contracts for towage, salvage, hauling, or carriage between points within the State and the carriage is not pursuant to either an established schedule or an undertaking to perform carriage services on behalf of the public generally, and also shall not include the business of any carrier by water, substantially engaged in interstate or foreign commerce, transporting passengers on luxury cruises between points within the State or on luxury roundtrip cruises returning to the point of departure; and

(7) Shall not include any person who (A) controls, operates, or manages plants or facilities for production, transmission, or furnishing of power primarily or entirely from non-fossil fuel sources, and (B) provides, sells, or transmits all of such power, except such power as is used in its own internal operations, directly to a public utility for transmission to the public.

In the event the application of this chapter is ordered by the commission in any case provided in paragraphs (4) and (5) the business of any public utility which presents evidence of bona fide operation on the date of the commencement of the proceedings resulting in the order shall

be presumed to be necessary to public convenience and necessity, but any certificate issued under this proviso shall nevertheless be subject to such terms and conditions as the commission may prescribe, as provided in section 269-20.

* * * *

§269-2 Public utilities commissions; number, appointment of commissioners, qualifications; compensation; persons having interest in public utilities. There shall be a public utilities commission of three members, to be called commissioners, and who shall be appointed in the manner prescribed in section 126-34, except as otherwise provided in this section. All members shall be appointed for terms of six years each, except that the terms of members first appointed shall be for two, four, and six years, respectively, as designated by the governor at the time of appointment. The governor shall designate a member to be chairman of the commission. Each member shall hold office until the member's successor is appointed and qualified. Section 26-34 shall not be applicable insofar as it relates to the number of terms and consecutive number of years a member can serve on the commission; provided that no member shall serve more than twelve consecutive years.

In appointing commissioners, the governor shall select persons who have had experience in accounting, business, engineering, government, finance, law, or other similar fields. The commission shall devote full time to their duties as members of the commission and no commissioners shall hold any other public office or other employment during the commissioner's term of office. No person owning any stock or bonds of any public utility corporation, or having any interest in, or deriving any remuneration from, any public utility shall be appointed a commissioners.

* * *

§269-3 Employment of assistants. (a) The chairman of the

public utilities commission may appoint and employ such clerks, stenographers, agents, engineers, accountants, and other assistants for the public utilities commission as the chairman finds necessary for the performance of the commission's functions and define their powers and duties. The chairman may appoint and at pleasure dismiss a chief administrator and such hearings officers as may be necessary. Notwithstanding section 103-3, the chairman shall appoint one or more attorneys independent of the attorney general who shall act as attorneys for the commission and define their powers and duties and fix their compensation. The chief administrator, hearings officers, and attorneys shall be exempt from chapters 76 and 77. Other employees shall be appointed as may be needed by the chairman in accordance with chapters 76 and 77.

(b) Notwithstanding section 91-13, the commission may consult with its assistants appointed under authority of this section in any contested case or agency hearing concerning any issue of facts. Neither the commission nor any of its assistants shall in such a proceeding consult with any other person or party except upon notice and an opportunity for all parties to participate, save to the extent required for the disposition of ex parte matters authorized by law.

* * *

§269-5 Annual report and register of orders. The public utilities commission shall prepare and present to the governor, through the director of finance, in the month of January in each year a report respecting its actions during the preceding fiscal year. This report shall include summary information and analytical, comparative, and trend data concerning major regulatory issues acted upon and pending before the commission; cases processed by the commission, including their dispositions; utility company operations, capital improvements, and rates; utility company performance in terms of efficiency and quality of

services rendered; environmental matters having a significant impact upon public utilities; actions of the federal government affecting the regulation of public utilities in Hawaii; long and short-range plans and objectives of the commission; together with the commission's recommendations respecting legislation and other matters requiring executive and legislative consideration. Copies of the annual reports shall be furnished by the governor to the legislature. In addition, the commission shall establish and maintain a register of all its orders and decisions, which shall be open and readily available for public inspection, and no order or decision of the commission shall take effect until it is filed and recorded in this register.

§269-6 General powers and duties. The public utilities commission shall have the general supervision hereinafter set forth over all public utilities, and shall perform the duties and exercise the powers imposed or conferred upon it by this chapter. Included among the general powers of the commission is the authority to adopt rules pursuant to chapter 91 necessary for the purposes of this chapter.

The chairman of the commission may appoint a hearing officer,who shall not be subject to chapters 76 and 77, to hear and recommend decisions in any proceeding before it other than a proceeding involving the rates or any other matters covered in the tariffs filed by the public utilities. The hearings officer shall have the power to take testimony, make findings of fact and conclusions of law, and recommend a decision; provided that the findings of fact, the conclusions of law, and the recommended decision shall be reviewed and may be approved by the commission after notice to the parties and an opportunity to be heard. The hearings officer shall have all of the powers conferred upon the public utilities commission under section 269-10.

§269-7 Investigative powers. The public utilities commission and each commissioner shall have power to examine into the condition of each public utility, the manner

in which it is operated with reference to the safety or accommodation of the public, the safety, working hours, and wages of its employees, the fares and rates charged by it, the value of its physical property, the issuance by it of stocks and bonds, and the disposition of the proceeds thereof, the amount and disposition of its income, and all its financial transactions, its business relations with other persons, companies, or corporations, its compliance with all applicable state and federal laws and with the provisions of its franchise, charter, and articles of association, if any, its classifications, rules, regulations, practices, and service, and all matters of every nature affecting the relations and transactions between it and the public or persons or corporations. Any investigation may be made by the commission on its own motion, and shall be made when requested by the public utility to be investigated, or upon a sworn written complaint to the commission, setting forth any prima facie cause of complaint. A majority of the commission shall constitute a quorum.

[§269-7.5] **Certificates of public convenience and necessity.** (a) No person which holds itself out to the general public as a public utility, as defined in section 269-1, shall commence its business without first having obtained from the commission a certificate of public convenience and necessity. Applications for certificates shall be made in writing to the commission and shall comply with the requirements prescribed in the commission's regulations, and rules of practice and procedure. The application shall include the type of service to be performed, the geographical scope of the operation, the type of equipment to be employed in the service, the name of competing utilities for the proposed service, a statement of its financial ability to render the proposed service, a current financial statement of the applicant, and the rates or charges proposed to be charged including the rules and regulations governing the proposed service.

(b) A certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if it is found that the applicant is fit, willing and able properly to perform the service proposed and to conform to the terms, conditions, rules and regulations promulgated by the commission thereunder, and that the proposed service is, or will be, required by the present or future public convenience and necessity; otherwise such application shall be denied. Any certificate issued shall specify the service to be rendered and there shall be attached to the exercise of the privileges granted by the certificate at the time of issuance and from time to time thereafter, such reasonable conditions and limitations as a public convenience and necessity may require.

(c) No public utility which holds a franchise or charter enacted or granted by the legislative or executive authority of the State or its predecessor governments, or which has a bona fide operation as a public utility heretofore recognized by the commission, shall be required to obtain a certificate of public convenience and necessity under this section.

(d) Any certificate may, upon application of the holder thereof and in the discretion of the public utilities commission, be amended, suspended or revoked, in whole or in part. The commission after notice and hearing may suspend, amend or revoke any certificate in part or in whole, if the holder thereof is found to be in wilful violation of any of the provisions of this chapter or with any lawful order, rule or regulation of the commission promulgated thereunder, or with any term, condition, or limitation of the certificate.

§269-8 Public utilities to furnish information. Every public utility shall at all times, upon request, furnish to the public utilities commission all information that it may require respecting any of the matters concerning which it

is given power to investigate, and shall permit the examination of its books, records, contracts, maps, and other documents by the commission, or any of its members, or any person authorized by it in writing to make such examination, and shall furnish the commission with a complete inventory of its property in such form as the commission may direct.

[§269.8.2] **Location of records.** A public utility shall keep and maintain within the State such records, books, papers, accounts, and other documents as the public utilities commission may determine are necessary to its effective regulation.

[§269-8.5] **Annual financial reports.** All annual financial reports required to be filed with the commission by public utilities shall include a certification that such report conforms with the applicable uniform system of accounts adopted by the commission.

* * *

§269-10 Commission may compel attendance of witnesses, etc. In all investigations made by the public utilities commission, and in all proceedings before it, the commission and each commissioner shall have the same powers respecting administering oaths, compelling the attendance of witnesses and the production of documentary evidence, examining witnesses, and punishing for contempt, as are possessed by circuit courts. In case of disobedience by any person to any order of the commission or of any commissioner, or any subpoena issued by it or the commissioner, or of the refusal of any witness to testify to any matter regarding which the witness may be questioned lawfully, any circuit court, on application by the commission or a commissioner, shall compel obedience as in case of disobedience of the requirements of a subpoena issued from a circuit court or a refusal to testify therein. No person shall be excused from testifying or from producing any book, waybill, document, paper, or account

in any investigation or inquiry by a hearing before the commission or any commissioner, when ordered to do so, upon the ground that the testimony or evidence, book, waybill, document, paper, or account required of the person may tend to incriminate the person or subject the person to penalty or forfeiture; but no person shall be prosecuted, punished, or subjected to any penalty or forfeiture for or on account of any act, transaction, matter, or thing concerning which the person shall under oath have testified or produced documentary evidence. Nothing herein shall be construed as in any manner giving to any public utility immunity of any kind. The fees and traveling expenses of witnesses shall be the same as allowed witnesses in the circuit courts and shall be paid by the State out of any appropriation available for the expenses of the commission. All meetings and hearings of the commission shall be public.

§269-12 Notices. (a) Whenever an investigation is undertaken by the public utilities commission, reasonable notice in writing of such fact and of the subject or subjects to be investigated shall be given to the public utility concerned, and when based upon complaints made to it as prescribed in section 269-7, a copy of the complaint, and a notice in writing of the date and place fixed by the commission for beginning the investigation, shall be served upon the public utility and the complainant not less than two weeks before the date designated for the hearing.

(b) Any notice provided pursuant to section 269-16(b), shall plainly state the rate, fare, charge, classification, schedule, rule, or practice proposed to be established, abandoned, modified, or departed from and the proposed effective date thereof and shall be given by filing the notice with the commission and keeping it open for public inspection.

(c) Any public hearing held pursuant to section 269-16(c), shall be an advertised public hearing or hearings on the

island on which the utility is situated. Notice of the advertised hearing, with the purpose thereof and the date, time, and place at which it will open, shall be advertised not less than once in each of three weeks in a newspaper published in and of general circulation in the State, the first publication being not less than twenty-one days before the public hearing and the last publication being not more than two days before the scheduled hearing. The applicant or applicants shall notify their consumers or patrons of the proposed change in rates and of the time and place of the public hearing not less than one week before the date set, the manner and the fact of notification to be reported to the commission before the date of hearing. The commission may use such additional media as radio or television to advise the public if it finds it necessary to do so.

§269-13 Right to be represented by counsel. At any investigation by or proceeding before the public utilities commission the public utility concerned and any complainant or permitted intervenor shall have the right to be present and represented by counsel, to present any evidence desired, and to cross-examine any witness who may be called.

§269-15 Commission may institute proceedings to enforce chapter. If the public utilities commission is of the opinion that any public utility is violating or neglecting to comply with any provision of this chapter or of any rule, regulation, order, or other requirement of the commission, or of any provisions of its franchise, charter, or articles of association, if any, or that changes, additions, extensions, or repairs are desirable in its plant or service to meet the reasonable convenience or necessity of the public, or to insure greater safety or security, or that any rates, fares, classifications, charges, or rules are unreasonable or unreasonably discriminatory, or that in any way it is doing what it ought not to do, or not doing what it ought to do, it shall in writing inform the public utility and may

institute such proceedings before it as may be necessary to require the utility to correct any such deficiency. In such event, the commission may by order direct the director of commerce and consumers affairs to appear in such proceeding, to carry out the purposes of this section. The commission may examine into any of the matters referred to in section 269-7, notwithstanding that the same may be within the jurisdiction of any court or other body; provided that this section shall not be construed as in any manner limiting or otherwise affecting the jurisdiction of any such court or other body.

§269-16 Regulation of utility rates; ratemaking procedures. (a) All rates, fares, charges, classifications, schedules, rules, and practices made, charged, or observed by any public utility, or by two or more public utilities jointly, shall be just and reasonable and shall be filed with the public utilities commission. The rates, fares, classifications, charges, and rules of every public utility shall be published by the public utility in such manner as the public utilities commission may require, and copies furnished to any person on request.

To the extent the contested case proceedings referred to in chapter 91 are required in any rate proceeding in order to ensure fairness and to provide due process to parties which may be affected by rates approved by the commission, such evidentiary hearings shall be conducted expeditiously and shall be conducted as a part of the ratemaking proceeding.

(b) No rate, fare, charge, classification, schedule, rule, or practice, other than one established pursuant to an automatic rate adjustment clause previously approved by the commission, shall be established, abandoned, modified, or departed from by any public utility, except after thirty days' notice as prescribed in section 269-12(b) to the commission and prior approval by the commission for any increases in rates, fares, or charges. The commission may,

in its discretion and for good cause shown, allow any rate, fare, charge, classification, schedule, rule, or practice to be established, abandoned, modified, or departed from upon notice less than that provided for in section 269-12(b). A contested case hearing shall be held in connection with any increase in rates and such hearing shall be preceded by a public hearing as prescribed in section 269-12(c) at which the consumers or patrons of the public utility may present testimony to the commission concerning the increase. The commission, upon notice to the public utility, may suspend the operation of all or any part of the proposed rate, fare, charge, classification, schedule, rule, or practice or any proposed abandonment or modification thereof or departure therefrom and after a hearing by order regulate, fix, and change all such rates, fares, charges, classifications, schedules, rules, and practices, so that the same shall be just and reasonable, and prohibit rebates and unreasonable discrimination between localities, or between users or consumers, under substantially similar conditions, regulate the manner in which the property of every public utility is operated with reference to the safety and accommodation of the public, prescribe its form and method of keeping accounts, books, and records, and its accounting system, regulate the return upon its public utility property, the incurring of indebtedness relating to its public utility business, and its financial transactions, and do all things in addition which are necessary and in the exercise of such power and jurisdiction, all of which as so ordered, regulated, fixed, and changed shall be just and reasonable, and such as shall provide a fair return on the property of the utility actually used or useful for public utility purposes.

(c) The commission may in its discretion and after public hearing, upon showing by a public utility of probable entitlement and financial need, authorize temporary increases in rates, fares, and charges; provided that the commission shall by order require the public utility to return in the

form of an adjustment to rates, fares, or charges to be billed in the future any amounts, with interest at a rate equal to the rate of return on such public utility's rate base found to be reasonable by the commission, received by reason of such continued operation which are in excess of the rates, fares, or charges finally determined to be just and reasonable by the commission. Interest on any such excess shall commence as of the date that any rate, fare, or charge goes into effect which results in any such excess and shall continue to accrue on the balance of any such excess until returned.

(d) The commission shall make every effort to complete its deliberations and issue its decision as expeditiously as possible and before nine months from the date the public utility filed its completed application; provided that in carrying out this mandate the commission shall require all parties to a proceeding to comply strictly with procedural time schedules which it establishes. If a decision is rendered after the nine-month period, the commission shall in writing report the reasons therefore to the Legislature within thirty days after rendering the decision.

Notwithstanding subsection (c), if the commission has not issued its final decision on a public utility's rate application within the nine-month period stated in this section, the commission shall within one month after the expiration of the nine-month period render an interim decision allowing the increase in rates, fares and charges, if any, to which the commission, based on the evidentiary record before it, believes the public utility is probably entitled. The commission may postpone its interim rate decision thirty days, if the commission considers the evidentiary hearings incomplete. In the event interim rates are made effective, the commission shall by order require the public utility to return in the form of an adjustment to rates, fares, or charges to be billed in the future any amounts, with interest at a rate equal to the rate of return on such public utility's rate base found to be reasonable

by the commission, received under such interim rates which are in excess of the rates, fares or charges finally determined to be just and reasonable by the commission. Interest on any such excess shall commence as of the date that any rate, fare, or charge goes into effect which results in any such excess and shall continue to accrue on the balance of any such excess until returned.

The nine-month period in this subsection shall begin only after a completed application has been filed with the commission and a copy served on the consumer advocate. The commission shall establish standards concerning the data required to be set forth in the application in order for it to be deemed a completed application. The consumer advocate may within twenty-one days after receipt object to the sufficiency of any application and the commission shall hear and determine any such objection within twenty-one days after the same is filed. If the commission finds that the objections are without merit, the application shall be deemed to have been completed upon original filing. If the commission finds the application to be incomplete, it shall require the applicant to submit an amended application consistent with its findings and the nine-month period shall not commence until the amended application is filed.

(e) In any case of two or more organizations, trades, or businesses (whether or not incorporated, whether or not organized in the State of Hawaii, and whether or not affiliated) owned or controlled directly or indirectly by the same interests, the commission may distribute, apportion, or allocate gross income, deductions, credits or allowances between or among the organizations, trades, or businesses, if it determine that the distribution, apportionment, or allocation is necessary in order to adequately reflect the income of any such organizations, trades, or businesses to carry out the regulatory duties imposed by this section.

(f) From every order made by the commission under the provisions of this chapter which is final, or if preliminary

is of the nature defined by section 91-14(a), an appeal shall lie to the supreme court subject to chapter 602 only by a person aggrieved in the contested case hearing provided for under this section in the manner and within the time provided by chapter 602, and by the rules of court. The appeal shall not of itself stay the operation of the order appealed from, but the court may stay the order after a hearing upon a motion therefore, and may impose such conditions as it may deem proper as to giving a bond and keeping the necessary accounts or otherwise in order to secure a restitution of the excess charges, if any, made during the pendency of the appeal in case the order appealed from should be sustained, reversed, or modified in whole or in part.

(g) For public utilities having annual gross revenues of less than $2,000,000, the commission may make and amend its rules and procedures which will provide the commission with sufficient facts necessary to determine the reasonable of the proposed rates without unduly burdening the utility company and its customers.

§269-25 Valuations. The public utilities commission may either upon its own motion or upon application by any utility for any order where the its own motion or upon application by any utility for any order where the commission deems it advisable and to the best interest of the public and the utility cause a valuation to be made to ascertain for any purpose specified in this chapter the value of the property of any public utility and every fact and element of value which in its judgment may or does have any bearing on such value. The commission may make revaluations and ascertain the value of all additions, betterments, extensions, and acquisitions of property of any public utility.

§269-28 Penalty. (a) Any public utility violating or neglecting or failing in any particular to conform to or comply with this chapter or any lawful order of the public

utilities commission shall be subject to a civil penalty not to exceed $1,000 for each such violation, neglect, or failure, to be assessed by the commission after a hearing in accordance with chapter 91. The commission may order the public utility to cease carrying on its business while the violation, neglect, or failure continues.

(b) Notwithstanding the provisions of subsection (a) of this section, any public utility violating or neglecting or failing in any particular to conform to or comply with any rule, regulation, or order of the commission setting forth safety requirements applicable to the transmission of gas shall be subject to a civil penalty not to exceed $1,000 for each day that such violation, neglect or failure continues; provided that the maximum penalty for related violations arising out of the same act, omission or occurrence shall not exceed $200,000.

(c) Upon written application filed within fifteen days after service of an order imposing a civil penalty pursuant to this section, the commission may remit or mitigate such penalty upon such terms as it deems proper.

(d) If any civil penalty imposed pursuant to this section is not paid within such period as the commission may direct, the attorney general shall institute a civil action for recovery of same in circuit court.

§269-29 Perjury. Any person who wilfully and knowingly makes under oath any false statement in connection with any investigation by or proceeding before the public utilities commission shall be guilty of perjury and, upon conviction, shall be subject to the penalty prescribed by law for the offense.

§269-31 Application of this chapter. This chapter shall not apply to commerce with foreign nations, or commerce with the several states of the United States, except insofar as the same may be permitted under the Constitution and laws of the United States; nor shall it apply to public

utilities owned and operated by the State, or any county, or other political subdivision.

[PART II.] CONSUMER ADVOCATE

§269-51 Consumer advocate; director of commerce and consumer affairs. The director of commerce and consumer affairs shall be the consumer advocate in hearings before the public utilities commission. The consumer advocate shall represent, protect, and advance the interest of consumers of utility services. The consumer advocate shall not receive any salary in addition to the salary received as director of commerce and consumer affairs.

The responsibility for advocating the interests of the consumer of utility services shall be separate and distinct from the responsibilities of the public utilities commission and those assistants employed by the commission. As consumer advocate, the director of commerce and consumer affairs shall have full rights to participate as a party in interest in all proceedings before the public utilities commission.

* * *

[§269-53] **Legal counsel.** The attorney general and the attorney general's deputies shall act as attorneys for the consumer advocate.

[§269-54] **General powers; duties.** (a) The consumer advocate shall have the authority expressly conferred upon the consumer advocate by or reasonably implied form the provisions of this part.

(b) The consumer advocate may:

(1) Adopt rules pursuant to chapter 91 necessary to effectuate the purposes of this part.

(2) Conduct investigations to secure information useful in lawful administration of any provision of this part.

(3) Assist, advise, and cooperate with federal, state, and local agencies and officials to protect and promote the interests of the consumer in the public utilities field.

(4) Study the operation of laws affecting consumers of utility services and recommend to the governor and the legislature new laws and amendments of laws in the consumers' interest in the public utilities field.

(5) Organize and hold conferences on problems affecting consumers of utility services.

(6) Perform such other acts as may be incidental to the exercise of the functions, powers, and duties set forth in this section.

(7) Represent the interests of consumers of utility services before any state or federal agency or instrumentality having jurisdiction over matters which affect those interests.

APPENDIX S

HAWAII REVISED STATUTES (1985 ed.)
CHAPTER 91
ADMINISTRATIVE PROCEDURE

§91-1 **Definitions.** For the purpose of this chapter:

(1) "Agency" means each state or county board, commission, department, or officer authorized by law to make rules or to adjudicate contested cases, except those in the legislative or judicial branches.

(2) "Persons" includes individuals, partnerships, corporations, associations, or public or private organizations of any character other than agencies.

(3) "Party" means each person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in any court or agency proceeding.

(4) "Rule" means each agency statement of general or particular applicability and future effect that implements, interpret or prescribes law or policy, or describes the organization, procedure, or practice requirements of any agency. The term does not include regulations concerning only the internal management of an agency and not affecting private rights of or procedure available to the public, nor does the term include declaratory rulings issued pursuant to section 91-8, nor intra-agency memoranda.

(5) "Contested case" means a proceeding in which the legal rights, duties, or privileges of specific parties are required by law to be determined after an opportunity for agency hearing.

(6) "Agency hearing" refers only to such hearing held by an agency immediately prior to a judicial review of a contested case as provided in section 91-14.

* * *

91-9 Contested cases; notice; hearing; records. (a) In any contested case, all parties shall be afforded an opportunity for hearing after reasonable notice.

(b) The notice shall include a statement of:

(1) The date, time, place, and nature of hearing;

(2) The legal authority under which the hearing is to be held;

(3) The particular sections of the statutes and rules involved;

(4) An explicit statement in plain language of the issues involved and the facts alleged by the agency in support thereof; provided that if the agency is unable to state such issues and facts in detail at the time the notice is served, the initial notice may be limited to a statement of the issues involved, and thereafter upon application a bill of particulars shall be furnished;

(5) The fact that any party may retain counsel if the party so desires and the fact that an individual may appear on the individual's own behalf, or a member of a partnership may represent the partnership, or an officer or authorized employee of a corporation or trust or association may represent the corporation, trust, or association.

(c) Opportunities shall be afforded all parties to present evidence and argument on all issues involved.

(d) Any procedure in a contested case may be modified or waived by stipulation of the parties and informal disposition may be made of any contested case by stipulation, agreed settlement, consent order, or default.

(e) For the purpose of agency decisions, the record shall include:

(1) All pleadings, motions, intermediate rulings;

(2) Evidence received or considered, including oral testimony, exhibits, and a statement of matters officially noticed;

(3) Offers of proof and rulings thereon;

(4) Proposed findings and exceptions;

(5) Report of the officer who presided at the hearing;

(6) Staff memoranda submitted to members of the agency in connection with their consideration of the case.

(f) It shall not be necessary to transcribe the record unless requested for purposes of rehearing or court review.

(g) No matters outside the record shall be considered by the agency in making its decision except as provided herein.

[§91.9.5] **Notification of hearing; service.** (a) Unless otherwise provided by law, all parties shall be given written notice of hearing by registered or certified mail with return receipt requested at least fifteen days before the hearing.

(b) Unless otherwise provided by law, if service by registered or certified mail is not made because of the refusal to accept service or the board or its agents have been unable to ascertain the address of the party after reasonable and diligent inquiry, the notice of hearing may be given to the party by publication at least once in each of two successive weeks in a newspaper of general circulation. The last published notice shall appear at least fifteen days prior to the date of the hearing.

§91.10 Rules of evidence; official notice. In contested cases:

(1) Any oral or documentary evidence may be received, but every agency shall as a matter of policy provide

for the exclusion of irrelevant, immaterial, or unduly repetitious evidence and no sanction shall be imposed or rule or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable, probative, and substantial evidence. The agencies shall give effect to the rules of privilege recognized by law.

(2) Documentary evidence may be received in the form of copies or excerpts, if the original is not readily available; provided that upon request parties shall be given an opportunity to compare the copy with the original.

(3) Every party shall have the right to conduct such cross-examination as may be required for a full and true disclosure of the facts, and shall have the right to submit rebuttal evidence.

(4) Agencies may take notice of judicially recognizable facts. In addition, they may take notice of generally recognized technical or scientific facts within their specialized knowledge; but parties shall be notified either before or during the hearing, or by reference in preliminary reports or otherwise, of the material so noticed, and they shall be afforded an opportunity to contest the facts so noticed.

(5) Except as otherwise provided by law, the party initiating the proceeding shall have the burden of proof, including the burden of producing evidence as well as the burden of persuasion. The degree or quantum of proof shall be a preponderance of the evidence.

§91-11 Examination of evidence by agency. Whenever in a contested case the officials of the agency who are to render the final decision have not heard and examined all of the evidence, the decision, if adverse to a party to the proceeding other than the agency itself, shall not be made until a proposal for decision containing a statement of

reasons and including determination of each issue of fact or law necessary to the proposed decision has been served upon the parties, and an opportunity has been afforded to each party adversely affected to file exceptions and present argument to the officials who are to render the decision, who shall personally consider the whole record or such portions thereof as may be cited by the parties.

§91-12 Decisions and orders. Every decision and order adverse to a party to the proceeding, rendered by an agency in a contested case, shall be in writing or stated in the record and shall be accompanied by separate findings of fact and conclusions of law. If any party to the proceeding has filed proposed has filed proposed findings of fact, the agency shall incorporate in its decision a ruling upon each proposed finding so presented. The agency shall notify the parties to the proceeding by delivering or mailing a certified copy of the decision and order and accompany findings and conclusions within a reasonable time to each party or to the party's attorney of record.

§91-13 Consultation by officials of agency. No official of an agency who renders a decision in a contested case shall consult any person on any issue of fact except upon notice and opportunity for all parties to participate, save to the extent required for the disposition of ex parte matters authorized by law.

91-14 Judicial review of contested cases. (a) Any person aggrieved by a final decision and order in a contested case or by preliminary ruling of the nature that deferral of review pending entry of a subsequent final decision would deprive appellant of adequate relief is entitled to judicial review thereof under this chapter; but nothing in this section shall be deemed to prevent resort to other means of review, redress, relief, or trial de novo, including the right of trial by jury, provided by law.

(b) Except as otherwise provided herein, proceedings for review shall be instituted in the circuit court within thirty

days after the preliminary ruling or within thirty days after service of the certified copy of the final decision and order of the agency pursuant to rule of court except where a statute provides for a direct appeal to the supreme court, which appeal shall be subject to chapter 602, and in such cases the appeal shall be in like manner as an appeal from the circuit court to the supreme court, including payment of the fee prescribed by section 607-5 for filing the notice of appeal (except in cases appealed under sections 11-51 and 40-91). The court in its discretion may permit other interested persons to intervene.

(c) The proceedings for review shall not stay enforcement of the agency decisions; but the reviewing court may order a stay if the following criteria have been met:

(1) There is likelihood that the subject person will prevail on the merits of an appeal from the administrative proceeding to the court;

(2) Irreparable damage to the subject person will result if a stay is not ordered;

(3) No irreparable damage to the public will result from the stay order; and

(4) Public interest will be served by the stay order.

(d) Within twenty days after the determination of the contents of the record on appeal in the manner provided by the rules of court, or within such further time as the court may allow, the agency shall transmit to the reviewing court the record of the proceeding under review. The court may require or permit subsequent corrections or additions to the record when deemed desirable.

(e) If, before the date set for hearing, application is made to the court for leave to present additional evidence material t the issue in the case, and it is shown to the satisfaction of the court that the additional evidence is material and that there were good reasons for failure to

present it in the proceeding before the agency, the court may order that the additional evidence be taken before the agency upon such conditions as the court deems proper. The agency may modify its findings, decision, and order by reason of the additional evidence and shall file with the reviewing court, to become a part of the record, the additional evidence, together with any modifications or new findings or decision.

(f) The review shall be conducted by the appropriate court without a jury and shall be confined to the record, except that in the cases where a trial de novo, including trial by jury, is provided by law and also in cases of alleged irregularities in procedure before the agency not shown in the record, testimony thereon may be taken in court. The court shall, upon request by any party, hear oral arguments and receive written briefs.

(g) Upon review of the record the court may affirm the decision of the agency or remand the case with instructions for further proceedings; or it may reverse or modify the decision and order if the substantial rights of the petitioners may have been prejudiced because the administrative findings, conclusions, decisions, or orders are:

(1) In violation of constitutional or statutory provisions; or

(2) In excess of the statutory authority or jurisdiction of the agency; or

(3) Made upon unlawful procedure; or

(4) Affected by other error of law; or

(5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or

(6) Arbitrary, or capricious, or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

(h) Upon a trial de novo, including a trial by jury as provided by law, the court shall transmit to the agency its decision and order with instructions to comply with the order.

APPENDIX T

THE FEDERAL COMMUNICATIONS ACT OF 1934, AS AMENDED

U.S. Code, Title 47; Telegraphs, Telephones, and Radiotelegraphs.

Subchapter I - General Provisions

§151. Purposes of Chapter; Federal Communications Commission Created

For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communication, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is hereby created a commission to be known as the "Federal Communications Commission," which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this Act.

(June 19, 1934, ch. 652, Title I, § 1, 48 Stat. 1064; May 20, 1937, ch. 229, § 1, 50 Stat. 189.)

§152. Application of chapter

(a) The provisions of this chapter shall apply to all interstate and foreign communication by wire or radio and all interstate and foreign transmission of energy by radio, which originates and/or is received within the United

States, and to all persons engaged within the United States in such communication or such transmission of energy by radio, and to the licensing and regulating of all radio stations as hereinafter provided; but it shall not apply to persons engaged in wire or radio communication or transmission in the Canal Zone, or to wire or radio communication or transmission wholly within the Canal Zone. The provisions of this chapter shall apply with respect to cable service, to all persons engaged within the United States in providing such service, and to the facilities of cable operators which relate to such service, as provided in subchapter V-A of this chapter.

(b) Except as provided in section 224 of this title and subject to the provisions of section 301 of this title and subchapter V-A of this chapter, nothing in this chapter shall be construed to apply or to give the commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier, or (2) any carrier engaged in interstate or foreign communication solely through physical connection with the facilities of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier, or (3) any carrier engaged in interstate or foreign communication solely through connection by radio, or by wire and radio with facilities, located in an adjoining State or in Canada or Mexico (where they adjoin the State in which the carrier is doing business), of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier, or (4) any carrier to which clause (2) or clause (3) of this subsection would be applicable except for furnishing interstate mobile radio communication service or radio communication service to mobile stations on land vehicles in Canada or Mexico; except that sections 201 to 205 of this title shall,

except as otherwise provided therein, apply to carriers described in clauses (2), (3), and (4) of this subsection. (June 19, 1934, ch. 652, Title I, § 2, 48 Stat. 1064; Apr. 27, 1954, ch. 175, § 1, 68 Stat. 63; Feb. 21, 1978, P. L. 95-234, § 5, 92 Stat. 35; Oct. 30, 1984, P. L. 98-549, § 3(a)(1), (2), 98 Stat. 2801.)

* * *

Subchapter II—Common Carriers

* * *

§221. Telephone companies; consolidation; state jurisdiction over services, charges, etc., unaffected; determination of property used in interstate toll service; valuation

(b) Subject to the provisions of section 301, nothing in this Act shall be construed to apply, or to give the Commission jurisdiction, with respect to charges, classifications, practices, services, facilities, or regulations for or in connection with wire, mobile, or point-to-point radio telephone exchange service, or any combination thereof, even though a portion of such exchange service constitutes interstate or foreign communication, in any case where such matters are subject to regulation by a State commission or by local governmental authority.

(c) For the purpose administering this Act as to carries engaged in wire telephone communication, the Commission may classify the property of any such carrier used for wire telephone communication, and determine what property of said carrier shall be considered as used in interstate or foreign telephone toll service. Such classification shall be made after hearing, upon notice to the carrier, the State commission (or the Governor, if the State has no State commission) of any State in which the property of said carrier is located, and such other persons as the commission may prescribe.

* * *

(June 19, 1934, ch. 652, Title II, § 221, 48 Stat. 1080; Apr. 27, 1954, ch. 175, § 4, 68 Stat. 64.)

Subchapter IV—Procedural and Administrative Provisions

§401. Enforcement of chapter and orders of commission; jurisdiction

(a) The district courts of the United States shall have jurisdiction, upon application of the Attorney General of the United States at the request of the Commission, alleging a failure to comply with or a violation of any of the provisions of this Act by any person, to issue a writ or writs of mandamus commanding such person to comply with the provisions of this Act.

(b) If any person fails or neglects to obey an order of the Commission other than for the payment of money, while the same is in effect, the Commission or any party injured thereby, or the United States, by its Attorney General, may apply to the appropriate district court of the United States for the enforcement of such order. If, after hearing, that court determines that the order was regularly made and duly served, and that the person is in disobedience of the same, the court shall enforce obedience to such order by a writ of injunction or other proper process, mandatory or otherwise, to restrain such person or the officers, agents, or representatives of such person, from further disobedience of such order, or to enjoin upon it or them obedience to the same.

* * *

(June 19, 1934, ch. 652, Title IV, § 401, 48 Stat. 1092; Dec. 21, 1974, P. L. 93-528, § 6(a), 88 Stat. 1709.)

* * *

§408. Orders Not For Payment of Money; When Effective

Except as otherwise provided in this Act, all orders of the Commission, other than orders for the payment of money, shall take effect thirty calendar days from the date upon which public notice of the order is given, unless the Commission designates a different effective date. All such orders shall continue in force for the period of time specified in the order or until the Commission or a court of competent jurisdiction issues a superseding order.

(June 19, 1934, ch. 652, Title IV, § 408, 48 Stat. 1096; Sept. 13, 1982, P. L. 97-259, Title I, § 123, 96 Stat. 1098.)

* * *

§410. Joint boards and commissions

(a) State joint boards; reference of communication matters; composition; jurisdiction, powers, duties, and obligations; conduct of proceedings; force and effect of joint board actions; members: nomination, appointment, and rejection; allowances for expenses

Except as provided in section 409 of this title, the Commission may refer any matter arising in the administration of this chapter to a joint board to be composed of a member, or of an equal number of members, as determined by the Commission, from each of the States in which the wire or radio communication affected by or involved in the proceeding takes place or is proposed. For purposes of acting upon such matter any such board shall have all the jurisdiction and powers conferred by law upon an examiner provided for in section 3105 of title 5, designated by the Commission, and shall be subject to the same duties and obligations. The action of a joint board shall have such force and effect and its proceedings shall be conducted in such manner as the Commission shall by regulations prescribe. The joint board member or members for each State shall be nominated by the State commission of the State

or by the Governor if there is no State commission, and appointed by the Federal Communications Commission. The Commission shall have discretion to reject any nominee. Joint board members shall receive such allowances for expenses as the Commission shall provide.

(b) State commissions; conferences with Commission regarding matters of carriers subject to their jurisdiction; joint hearings; cooperation with Commission

The Commission may confer with any State commission having regulatory jurisdiction with respect to carriers, regarding the relationship between rate structures, accounts, charges, practices, classifications, and regulations of carriers subject to the jurisdiction of such State commission and of the Commission; and the Commission is authorized under such rules and regulations as it shall prescribe to hold joint hearings with any State commission in connection with any matter with respect to which the Commission is authorized to act. The Commission is authorized in the administration of this chapter to avail itself of such cooperation, services, records, and facilities as may be afforded by any State Commission.

(c) Federal-State Joint Board; reference of proceedings regarding jurisdictional separation of common carrier property and expenses between interstate and intrastate operations and other matters relating to common carrier communications of joint concern; jurisdiction, powers, duties, and obligations; recommendation of decisions; State members; presence at oral arguments and nonvoting participation in deliberations; composition; Chairman

The Commission shall refer any proceeding regarding the jurisdictional separation of common carrier property and expenses between interstate and intrastate operations, which it institutes pursuant to a notice of proposed rulemaking and, except as provided in section 409 of this title, may refer any other matter, relating to common carrier

communications of joint Federal-State concern, to a Federal-State Joint Board. The Joint Board shall possess the same jurisdiction, powers, duties, and obligations as a joint board established under subsection (a) of this section, and shall prepare a recommended decision for prompt review and action by the Commission. In addition, the State members of the Joint Board shall sit with the Commission en banc at any oral argument that may be scheduled in the proceeding. The Commission shall also afford the State members of the Joint Board an opportunity to participate in its deliberations, but not vote, when it has under consideration the recommended decision of the Joint Board or any further decisional action that may be required in the proceeding. The Joint Board shall be composed of three Commissioners of the Commission and of four State commissioners nominated by the national organization of the State commissions as referred to in sections 302(b) and 305(f) of Title 49, and approved by the Commission. The Chairman of the Commission, or another commissioner designated by the Commission, shall serve as Chairman of the Joint Board.

(As amended Sept. 30, 1971, Pub.L. 92-131, § 2, 85 Stat. 363.)

APPENDIX U

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

FCC 81-312
29693

Docket No. 21263

In the Matter of

Integration of Rates and Services for the Provision of Communications by Authorized Common Carriers between the United States Mainland and Hawaii and Alaska

REPORT AND ORDER

Adopted: June 29, 1981 Released: July 8, 1981

By the Commission:

1. The Commission has a under consideration the Memorandum Opinion and Order of the Federal-State Joint Board on separations procedures for Hawaii and Alaska, adopted June 29, 1981, which is attached hereto. We agree with the findings of the Joint Board.

2. Accordingly, IT IS ORDERED, That the attached Memorandum Opinion and Order of the Federal-State Joint Board IS ADOPTED as the Commission's Report and Order herein.

3. IT IS FURTHER ORDERED, That, pursuant to the provisions of Sections 4(i), 205, 213, 221(c), 221(d), and 403 of the Communications Act of 1934, as amended, the NARUC-FCC Separations Manual, which is incorporated

by reference into Part 67 of the Commission's Rules and Regulations, SHALL APPLY to Hawaii and Alaska.

4. IT IS FURTHER ORDERED, That Section 67.1(e) of the Commission's Rules and Regulations, 47 C.F.R. 67.1(a), IS AMENDED to read as follows: These Separations Procedures apply to Puerto Rico, the United States Virgin Islands, Alaska and Hawaii.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico
Secretary

MEMORANDUM OPINION AND ORDER

Adopted June 29, 1981 Released:

By the Federal-State Joint Board:

1. Before the Federal State Joint Board are Joint Motions[1] requesting that we recommend to the Federal Communications Commission (the Commission) prescription of the NARUC-FCC Separations Manual for application to Message Telecommunications Service (MTS) and Wide Area Telecommunications Service (WATS) between the United States Mainland and Alaska and Hawaii. Comments have been filed by Southern Pacific Communications Company (SPCC), members of Congress from Alaska and Hawaii[2] and the Governors of Alaska and Hawaii. The American Telephone and Telegraph Company (AT&T) has filed an opposition and the Hawaiian Telephone Company (Hawtel) a motion to strike with respect to SPCC's comments.[3] For the reasons indicated below, we will grant the Joint Motions.

BACKGROUND

2. In light of its previous determination that the public interest required that interstate MTS and WATS rates between the United States mainland and Alaska and Hawaii should be integrated into the mainland domestic rate

[1] A "Joint Motion" filed April 25, 1980 by the American Telephone and Telegraph Company and Alascom, Inc. and a "Joint Motion" filed July 23, 1980 by the American Telephone and Telegraph Company and the Hawaiian Telephone Company. The respective agreements are attached hereto as Appendices A and B.

[2] From Alaska, United States Senators Ted Stevens and Mike Gravel and Congressman Don Young and from Hawaii, United States Senator Daniel K. Inouye and Congressmen Daniel K. Akaka and Cecil Heftal.

[3] We find that the public interest requires consideration of SPCC's comments and accordingly the motion to strike is denied.

pattern,[4] the Commission initiated the present proceeding to determine what changes, if any, should be made in existing mainland jurisdictional separations procedures so that they could be made applicable to Alaska and Hawaii. *Notice of Inquiry, Notice of Proposed Rulemaking,* 64 FCC 1033 (1977). At the present time jurisdictional separations for mainland services are determined under the NARUC-FCC Separations Manual, incorporated by reference into part 67 of the Commission's Rules, 47 C.F.R. Part 67. In a separate proceeding the Commission has concluded that the Separations Manual should be applicable to MTS and WATS between the U.S. Mainland and Puerto Rico and the Virgin Islands. *Report and Order,* Docket No. 21264, 72 FCC 2d 699 (1979).

THE JOINT MOTIONS AND AGREEMENTS

3. As indicated, AT&T, Hawtel and Alascom have submitted Joint Motions accompanied by their respective agreements. Briefly stated, they request that we recommend to the Commission prescription of the Separations Manual, without modification, for application to interstate MTS and WATS between the United States mainland and Alaska and Hawaii. In their agreements, the carriers propose January 1, 1985 as the final date for rate integration. This would require modification by the Commission of the existing date which is ninety days after prescription of

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[4] *Establishment of Domestic Communications - Satellite Facilities,* 35 FCC 2d 844 (1972) in which we determined that the public interest required that interstate MTS and WATS rates between the United States mainland and Hawaii and Alaska be integrated into the mainland domestic rate pattern; *Integration of Rates and Services,* 61 FCC 2d 380 (1976) in which we directed that such integration should be accompanied by cost-based settlements based on prescribed jurisdictional separations procedures. See also *Memorandum Opinion and Order,* FCC 78-693, released September 29, 1978 concerning the final date for rate integration.

separation rules for Alaska and Hawaii.[5] Pending the extended date for rate integration, the carriers propose an interim settlements procedure. The proposed settlements procedure is essentially the same for settlements between AT&T and Hawtal and between AT&T and Alascom, and provides that settlements will consist of a uniform cost-based portion calculated according to the existing Separations Manual plus a so-called transitional supplement. The transitional supplement is proposed to be based on a declining percentage of the cumulative total growth over 1979 in actual MTS and WATS interstate revenues.[6] The declining percentages differ somewhat in each agreement. In addition, for the settlement for 1980 between Hawtel and AT&T, it is proposed that it be based on 70 percent of actual two-way interests MTS and WATS revenues. As indicated, the interim settlement procedure will terminate on January 1, 1985 at which time full rate integration will take place. The agreement between Hawtal and AT&T also specifies that the Separations Manual be applied for allocation of exchange costs for international MTS, including use of the domestic interstate composite station rate ratio.

CONTENTIONS OF THE PARTIES

4. The members of Congress and the Governors of the States of Alaska and Hawaii support the agreements of the carriers and urge their acceptance and approval. SPCC addresses only the agreement between Hawtel and AT&T. It states that it does not object to the agreement in general but only to the structure of the proposed transitional

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[5] See *Memorandum Opinion and Order*, FCC 78-693, released September 29, 1978.

[6] For example, the agreement between Hawaiian Telephone Company and the American Telephone and Telegraph Company provides that the applicable percentage for 1982 will be 60%. This means that 60% of the revenues in excess of 1979 revenues will be paid by AT&T to Hawtel as the transitional supplement. In 1983 the percentage is 35%, in 1984 20%.

supplement. Specifically, it objects to the fact that the transitional supplement will be based on a percentage of total revenue growth of MTS and WATS. It claims that this will give Hawtel the incentive to resist introduction of competitive MTS and WATS-type services[7] and notes that Hawtel has filed a petition to deny SPCC's application for authorization to provide its SPRINT service in Hawaii. SPCC urges that as an alternative we prescribe that the transitional supplement portion of the proposed interim settlements procedure consist of a lump sum payment to Hawtel.

5. In its opposition to SPCC's comments, AT&T states that the agreements should be accepted and approved because SPCC's contentions are speculative, because the time period until rate integration is relatively short, because the declining percentages called for in the agreements will minimize over time the effect of any diverted revenue growth and because a lump sum payment would inhibit Hawtel's incentive to encourage growth in services, which would be contrary to the public interest.

DISCUSSION

6. The Joint Motions and accompanying agreements provide for a method of jurisdictional separations and for full rate integration of MTS and WATS services between the United States mainland and Alaska and Hawaii. As such, these agreements achieve the fundamental purposes of Docket No. 21263 and of related proceedings looking toward rate integration.[8] Accordingly, we find compelling public interest reasons for their acceptance and approval as requested by the parties.

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[7] Presumbaly this is because Hawtel would resist competition in order to maximize supplemental payments.

[8] See Note 4, supra.

7. We are aware that the agreements require deferral of the date for final rate integration until January 1, 1985 and this must be considered an undesirable aspect of the agreements since it is in the public interest that this be achieved at the earliest possible date. However, the carriers' agreements are expressly contingent on this deferral and we must balance the delay in full rate integration against the delay that would inevitably result if the agreements fail and further proceedings in Docket No. 21263 become necessary. These further proceedings could potentially be of indefinite duration. For this reason, and because rate modifications consistent with the agreements will diminish the disparity of rates between mainland and offshore points, we conclude that the deferral requested by the carriers is not contrary to the public interest such that rejection of the proposed agreements is warranted.

8. We find little reason to object to the proposed interim settlements procedure. In view of the fact, as indicated, that the agreements are the vehicles for the achievement of major, long-standing Commission policy objectives, any concerns about the interim settlement procedures are secondary unless the interim proposals are egregiously unreasonable. In this connection, we note that the interim settlement procedures have been forged in the context of negotiations between the parties and appear to represent compromise positions between the carriers. As such, although they do not necessarily reflect optimum settlement procedures, nothing in them appears clearly unreasonable. Specifically, the use of decreasing percentages each year to calculate the transitional supplement appears to be a reasonable phased-in approach to final rate integration.

9. SPCC's objections do not change this conclusion. Although it claims that the method of calculating the transitional supplement will provide an incentive for Hawtel to engage in anticompetitive conduct, we do not believe that the slight effect that SPCC competition might have on payments to Hawtel under the interim settlements pro-

cedure would be likely to effect Hawtel in its dealings with SPCC. AT&T will continue to carry the vast preponderance of traffic under any reasonable scenario. If at a later date SPCC encounters difficulty in obtaining any needed interconnection from Hawtel, it can make its problems known to the Commission. We also note that these are interim proposals, and the basis for any objections will be eliminated when final rate integration is achieved. Finally, we find that SPCC's objections are insufficient because it has not supported its claim that a lump sum payment would be preferable. In particular, it has provided no suggestions as to how such a payment would be calculated.

10. Except for the objections to the interim settlements procedure offered by SPCC, the carriers' request that the Separations Manual be applicable without modification to MTS and WATS between the U.S. Mainland and Alaska and Hawaii is unopposed. However, we are mindful of the allegedly unique and difficult problems associated with serving Alaska and Hawaii which have been brought to our attention in the extensive and carefully compiled record before us. We believe that many of the cost problems associated with serving rural communities in Alaska and elsewhere in the United States, and the extent to which the public interest requires that ratepayers nationwide should bear the costs of service to these communities, may need further examination. Ideally, this inquiry would be conducted in a policy-making proceeding devoted solely to this issue, perhaps including legislative initiatives, rather than in the context of a proceeding to determine cost-based separations. For the present, however, we note that application of the Separations Manual to Alaska will result in the assignment to the interstate jurisdiction of substantial portions of the cost of serving remote communities.[9] Thus, many of the concerns which motivated the

[9] See AT&T's response to supplemental information request No. 2,

proposals for supplemental Alaska payments will be addressed by application of the Separations Manual. Nevertheless, the Commission must continue to discharge its obligation under the Act to make available to all the people of the United States, in so far as possible, a rapid, efficient, wire and radio communications service at reasonable cost.[10] We urge the Commission to reexamine in the future the costs of serving rural communities, if warranted.

11. We have carefully evaluated the Joint Motions, the supporting agreements and the parties' comments thereon and we find that the public interest, convenience, and necessity would be served by granting the Joint Motions and approving and accepting the attached agreements.

12. Accordingly, IT IS ORDERED, That the "Joint Motion" submitted by the American Telephone and Telegraph Company and Alascom, Inc. on April 25, 1980 and the "Joint Motion" submitted by the American Telephone and Telegraph Company and the Hawaiian Telephone Company on July 23, 1980, ARE GRANTED.

13. In addition, IT IS RECOMMENDED, That the Federal Communitions Commission amend its rules so that the NARUC-FCC Separations Manual be applicable without modification to Alaska and Hawaii.

14. IT IS FURTHER RECOMMENDED, That the Federal Communications Commission ACCEPT AND APPROVE the Agreements submitted by The American Telephone and Telegraph Company and Alascom, Inc. and the American Telephone and Telegraph Company and the Hawaiian Telephone Company, Inc. on April 25, 1980 and July 23, 1980, respectively.

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filed November 26, 1979, where it argues that at least 71% of such costs under the Separations Manual would be allocated to interstate.

[10] See 47 U.S.C. §151.

THE FEDERAL-STATE JOINT BROAD

Robert E. Lee, Chairman

Memorandum Opinion and Order

Adopted: June 29, 1961.

Released: July 8, 1961.

By the Commission:

1. Before the Commission are Joint Motions[1] seeking approval of agreements implementing rate integration for Message Telecommunications Service (MTS) and Wide Area Telecommunications Service (WATS) between the United States Mainland and Alaska and Hawaii. COmments have been filed by Southern Pacific Communications Company (SPCC), members of Congress from Alaska and Hawaii[2] and Governors of Alaska and Hawaii. The American Telephone and Telegraph Company (AT&T) has filed an opposition and the Hawaiian Telephone Company (Hawtel) a motion to strike with respect to SPCC's comments.[3] For the reasons indicated below, we will accept and approve the Joint Motions.

Background

2. In an order adopted this same date, the Commission has concluded Docket 21263 by accepting and adopting as its own opinion the recommended decision of the Federal State Joint Board in that proceeding. Docket 21263 con-

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[1] A "Joint Motion to Approve Agreement" filed April 25, 1980 by the American Telephone and Telegraph Company and Alascom, Inc. and a "Joint Motion to Approve Agreement" filed July 23, 1980 by the American Telephone and Telegraph Company and the Hawaiian Telephone Company. the respective agreements are attached hereto as Appendices A abd B.

[2] From Alaska, United States Senators Ted Stevens and Mike Gravel and Congressman Don Young and from Hawaii, United States Senator Daniel K. Inouye and Congressmen Daniel K. Alaska and Cecil Heftel.

[3] We find that the public interest requires consideration of SPCC's comments and accordingly the motion to strike is denied.

cerned what modifications should be made in existing separations procedures in order to achieve rate integration for MTS and WATS service between the United States Mainland and Alaska and Hawaii. Stated briefly, the Commission prescribed that the existing Separations Manual incorporated by reference in the Commission's rules, 47 C.F.R. § 67.1, would be fully applicable without modification to determine jurisdictional separations and cost-based settlements in Alaska and Hawaii. However, the carriers have requested a deferral of the final date for rate integration and have proposed interim settlement procedures pending full rate integration. It is these proposals which are the subject of the Joint Motions and to which we now turn.

The Joint Motions and Agreements

3. The carriers request that we specify January 1, 1965 as the effective date for final rate integration for MTS and WATS service between the United States mainland and Alaska and Hawaii. This will require modification of the existing specified date which is ninety days after the prescription of separations rules for Alaska and Hawaii.[4] Since we have today prescribed the existing Separations Manual for allocation of exchange costs for international MTS, including use of the domestic interstate composite station rate ratio.

4. In their agreements, the carriers propose an interim settlement procedure pending the final date for rate integration of January 1, 1985. The proposed settlement procedures are essentially the same for settlements between AT&T and Hawtel and between AT&T and Alascom, and provide that settlements will consist of a uniform cost-based portion calculated according to the existing Separations Manual plus a so-called transitional supplement.

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[4] See *Memorandum Opinion and Order*, FCC 76-693, released September 29, 1978.

The transitional supplement is proposed to be based on a declining percentage of the cumulative total growth over 1979 in actual MTS and WATS interstate revenues.[5] The declining percentages differn somewhat in each agreement. In addition, for the settlement for 1980 between Hawtel and AT&T, it is proposed that it be based on 78% of actual of actual two-way interstate MTS and WATS revenues. As indicated, the interim settlement procedure will terminate on January 1, 1985 at which time full rate integration will take place.

Contentions of the Parties

5. The members of Congress and the Governors of the States of Alaska and Hawaii support the agreements of the carriers and urge their acceptance and approval. SPCC addresses only the agreement between Hawtel and AT&T. It states that it does not object to the agreement in general but only to the structure of the proposed transitional supplement. Specifically, it objects to the fact that the transitional supplement will be based on a percentage of total revenue growth of MTS and WATS services. It claims that this will give Hawtel the incentive to resist introduction of competitive MTS and WATS services[6] and notes that Hawtel has filed a petition to deny SPCC's application for authorization to provide SPRINT service in Hawaii, SPCC urges that as an alternative we prescribe that the transitional supplement portion of the proposed interim settlements procedure consist of a lump sum payment to Hawtel.

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[5] For example, the agreement between Hawaiian Telephone Company and the American Telephone and Telegraph Company provides that the applicable percentage for 1982 will be 60%. This means that 60% of the revenues in excess of 1979 revenues will be paid by AT&T to Hawtel as the transitional supplement. In 1963 the percentage is 35%, in 1964 20%.

[6] Presumably this is because Hawtel would resist competition in order to maximize supplemental payments.

6. In its opposition to SPCC's comments, AT&T states that the agreements should be accepted and approved because SPCC's contentions are speculative, because the time period until rate integration is relatively short, because the declining percentages called for in the agreements will minimize over time the effect of any diverted revenue growth and because a lump sum payment would inhibit Hawtel's incentive to encourage growth in services, which would be contrary to the public interest.

Discussion

7. The Joint Motions urge our acceptance and approval of agreements which provide for a method of jurisdictional separations and for full rate integration of MTS and WATS services between the United States mainland and Alaska and Hawaii. As such, these agreements achieve the fundamental purposes of Docket 21263 and of related proceedings looking toward rate integration.[7]

8. We are aware that approval of these agreements will require deferral of the date for final rate integration until January 1, 1985 and this must be considered an undesirable aspect of the agreements since it is in the public interest that this be achieved at the earliest possible date.

See *Establishment of Domestic Communications—Satellite Facilities*, 35 FCC 2d 644 (1972) in which we determined that the public interest required that interstate MTS and WATS rates between the United States mainland and Hawaii and Alaska be integrated into the mainland domestic rate pattern; *Integration of Rates and Services*, 61 FCC 2d 360 (1976) in which we directed that such integration should be accomplished by phased reduction in three steps; and *Integration of Rates and Services*, 61 FCC 2d 380 (1976) *reconsideration*, 65 FCC 2d 324 (1977) in which we determined that such integration should be accompanied by cost-based settlements based on prescribed jurisdictional separations procedures. See also *Memorandum Opinion and Order*, FCC 76-693, released September 29, 1976 concerning the final date for rate integration.

However, the carriers' agreements are expressly contingent on this defferal and we must balance the delay in full rate integration against the delay that would inevitably result if the agreements fail and further proceedings in Docket 21263 become necessary. These further proceedings could potentially be of indefinite duration. For this reason, and because rate modifications consistent with the agreements will diminish the disparity of rates between mainland and offshore points, we conclude that the deferral requested by the carriers is not so contrary to the public interest such that rejection of the proposed agreements is warranted.

9. We find little reasons to object to the proposed interim settlements procedures. In view of the fact, as indicated, that the agreements are the vehicles for the achievement of major, long-standing Commission policy objectives, any concerns about the interim settlement procedures are secondary unless the interim proposals are egregiously unreasonable. In this connection, we note that interim settlement procedures have been forged in the context of negotiations between the parties and appear to represent compromise positions between the carriers. As such, although they do not necessarily reflect optimum settlement procedures, nothing in them appears clearly unreasonable. More particularly, the use of decreasing percentages each year to calculate the transitional supplement appears to be a reasonable phased-in approach to final rate integration. Accordingly, we find no reason to reject the interim settlement procedures.

10. SPCC's objections do not change this conclusion. Although it claims that the method of calculating the transitional supplement will provide an incentive for Hawtel to engage in anticompetitive conduct, we do not believe that the slight effect that SPCC competition might have on payments to Hawtel under the interim settlement procedure would be likely to affect Hawtel in its dealings with SPCC. AT&T will continue to carry the vast pre-

ponderance of traffic under any reasonable scenario. If at a later date SPCC encounters difficulty in obtaining any needed interconnection from Hawtel, it can make its problems known to the COmmission. We also note that these are interim proposals, and any objections will be eliminated when final rate integration is achieved. Finally, we find that SPCC's objections are insufficient because it has not supported its claim that a lump sum payment would be preferable. Thus, it has provided no suggestions as to how such a payment would be calculated.

11. We have carefully evaluated the Joint Motions, the supporting agreements and the parties' comments thereon and we find that the public interest, convenience, and necessity will be served by granting the Joint Motions and approving and accepting the attached agreements.

12. Accordingly, it is ordered, That the "Joint Motion to Approve Agreement" submitted by the American Telephone and Telegraph Company and Alascom, Inc. on April 25, 1980 and the "Joint Motion to Approve Agreement" submitted by the American Telephone and Telegraph Company and the Hawaiian Telephone Company on July 23, 1980, are granted and the agreements with respect thereto are accepted and approved.

13. It is further ordered, That the final date for rate integration for MTS and WATS serves between the United States mainland and Hawaii and Alaska is extended until January 1, 1985.

Federal Communications Commissions.
William J. Tricarico,*Secretary*.

(3)

No. 87-1152

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

PUBLIC UTILITIES COMMISSION OF THE STATE OF HAWAII; ALBERT TOM, Chairman; SUNAO KIDO, Commissioner; and RUSSEL S. NAGATA, Director of the Department of Commerce and Consumer Affairs, State of Hawaii, and Consumer Advocate,

Petitioners,

v.

HAWAIIAN TELEPHONE COMPANY, a Hawaii Corporation,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether the District Court properly entered an order under Section 401(b) of the Communications Act of 1934 enjoining the Public Utilities Commission of Hawaii from using interstate revenues in its intrastate rate calculations, contrary to the joint Federal-state separations manual, which had been made applicable to Hawaii by an order of the Federal Communications Commission pursuant to Section 410(c) of that Act.

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COUNTERSTATEMENT OF THE CASE

Respondent Hawaiian Telephone Company (Hawaiian Tel)[1] provides telecommunications services

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[1] Hawaiian Tel, now known as GTE Hawaiian Telephone Company Incorporated, is a wholly-owned subsidiary of GTE Corporation (GTE). GTE is a publicly held corporation whose stock is traded on the New York Stock Exchange and other domestic and foreign exchanges. A list of principal GTE subsidiaries is printed in an appendix (RA-2).

throughout the state of Hawaii and between Hawaii and the continental United States and numerous overseas points. The Federal Communications Commission has exclusive jurisdiction over Hawaiian Tel's interstate and foreign services pursuant to the Communications Act of 1934 (Act), 48 Stat. 1064, as amended, 47 U.S.C. § 151 *et seq.* The Public Utilities Commission of Hawaii (PUC) has jurisdiction to regulate Hawaiian Tel's intrastate public utility rates and services.

This case arose out of the PUC's improper attempt to evade the FCC's 1981 separations order requiring application of the joint Federal-state separations manual to Hawaii.[2] The U.S. District Court for the District of Hawaii enforced the FCC's order pursuant to Section 401(b) of the Act,[3] and the United States Court of Appeals for the Ninth Circuit affirmed.[4]

Jurisdictional Separations

Jurisdictional separations is the process by which telephone property, revenues, and expenses are separated (that is, allocated or assigned) between the interstate and intrastate jurisdictions. Separations is

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[2] Integration of Rates and Services for the Provision of Communications by Authorized Common Carriers between the United States Mainland and Hawaii and Alaska (Docket 21263), Report & Order 81-312, 87 F.C.C.2d 18 (1981) (hereafter FCC Order 81-312), reprinted in Appendix to Petition ("A. ___") at A. 249a.

[3] Hawaiian Telephone Co. v. Public Utilities Commission, Civil No. 84-1306 (D. Haw. Mar. 28, 1985) (judgment for permanent injunction) A. 170a (hereafter Judgment for Permanent Injunction).

[4] Hawaiian Tel. v. PUC, 827 F.2d 1264 (9th Cir. 1987) (A. 1a).

required because much, if not most, of a telephone company's plant is used in common in interstate and intrastate services. *See* opinion below and authorities cited therein (A. 1a, 5a-6a); *cf. Louisiana PSC* v. *FCC*, 476 U.S. 355, 360, 375 (1986).

Since 1934 the formulation and revision of separations procedures have been the product of cooperative efforts involving the FCC, state commissions through the National Association of Regulatory Utility Commissioners (NARUC), and the telephone industry. *See New York Telephone Co.* v. *FCC*, 631 F.2d 1059, 1062 (2d Cir. 1980). The FCC establishes separations procedures only after hearing and notice to affected state commissions, 47 U.S.C. § 221(c), and after first referring the matter to a Federal-state joint board for a recommended decision, 47 U.S.C. § 410(c).

Prior to 1981, the FCC had not prescribed specific separations procedures for Hawaii. Exercising its authority under 47 U.S.C. § 410, the FCC established a joint board to advise it on fair separations procedures for Hawaii.[5] The joint board recommended that the existing NARUC-FCC Separations Manual (then embodying the so-called Ozark Plan) be made applicable, without modification, to Hawaii.[6] Based on the Joint Board's recommendation, the FCC specifically ordered that "the NARUC-FCC Separations Man-

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[5] Notice of Inquiry, Proposed Rulemaking and Creation of Federal-State Joint Board (Docket 21263), 64 F.C.C.2d 1033 (1977). Petitioner Albert Tom, then Chairman of the PUC, was a member of the joint board in Docket 21263.

[6] Opinion & Order in re Integration of Rates & Services for the Provision of Communications by Authorized Common Carriers between the United States Mainland & Hawaii & Alaska (Docket 21263), 87 F.C.C.2d 20, 24 (1981) (A. 251a).

ual . . . SHALL APPLY to Hawaii and Alaska. . . ." FCC Order 81-312 (A. 249a).

Proceedings Below

In 1981 and again in 1982 Hawaiian Tel filed applications to increase intrastate rates with the PUC. The history of the proceedings in these rate cases, Dockets 4306 and 4588, is detailed in the opinion of the Ninth Circuit (A. 1a, 7a-8a). In its August, 1984, decision and order in Docket 4588, the PUC determined that a rate increase of $30,840,000 was necessary to yield a fair rate of return, but reduced the increase by $10,507,000 based on the difference between using the Ozark Plan prescribed by the FCC and its own separations plan, Hawaiian Plan II.[7] Commissioner DuPont issued a strong dissent with respect to the PUC's adoption of the separations adjustment, stating: "The use of interstate revenues for intrastate costs is illegal. Despite the protestations to the contrary, the majority continues to undercut the Ozark Plan which it ostensibly adopts."[8]

Hawaiian Tel then filed a complaint for declaratory and injunctive relief in the U.S. District Court for the District of Hawaii (A. 179a). After trial, then-Chief Judge Samuel P. King found that "[t]he PUC's action had the effect of applying Hawaiian Plan II . . . instead of the Ozark Plan as a basis for separations."[9] As a result, the court permanently enjoined the PUC and its commissioners from failing to obey

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[7] Re Hawaiian Telephone Co. (Docket No. 4588), Decision & Order No. 8042 (Aug. 14, 1984) (A. 90a).

[8] *Id.*, Dissent at 1 (A. 120a).

[9] Judgment for Permanent Injunction, ¶ 13 (A. 175a).

FCC Order 81-312 and ordered the PUC to implement rates for Hawaiian Tel sufficient to generate the $10,507,000 in annual revenues taken away by the adjustment.[10]

The district court's order was affirmed by the Ninth Circuit (A. 1a).[11] The well-reasoned majority opinion by Circuit Judge Canby addressed and disposed of each of Petitioners' contentions briefed on appeal.[12] The court of appeals held that the FCC had preempted state regulation of separations procedures, that the district court had subject matter jurisdiction under the Communications Act to issue the injunction, and that the action was not barred by the Johnson Act or by res judicata. The court, upholding the finding below that the PUC's "adjustment was in effect a thinly veiled attempt to depart from the required separation of plant and expenses between interstate and intrastate use", then affirmed the district court's order enjoining the PUC and its commissioners. (A. 29a).

ARGUMENT

The district court properly entered a judicial order enforcing the Federal Communications Commission's 1981 order making the joint separations manual applicable to Hawaii. Congress intended that such or-

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[10] *Id.* (ordering paragraphs) (A. 177a).

[11] Petitioners' petition for rehearing and their suggestion for rehearing en banc were rejected by order filed January 13, 1988, after the filing of their petition for certiorari on January 9. The order is reprinted in Respondent's Appendix at RA-1.

[12] Petitioners have attempted to raise additional questions in their petition for certiorari.

ders of the FCC have preemptive effect and that they be enforceable in the district courts pursuant to Section 401(b) of the Communications Act.

Having found that the Hawaii PUC had attempted to evade the FCC's 1981 separations order, the district court properly acted to enforce the Federal order. Contrary to Petitioners' claims, neither *Pullman* nor *Burford* abstention would have been appropriate, since the district court acted to enforce an overriding Federal order. Petitioners' remaining claims are without substance and, in most cases, were not preserved below.

So viewed, the petition presents no important issue warranting consideration by this Court.

I. CONGRESS INTENDED THE FCC'S SEPARATIONS ORDERS TO HAVE PREEMPTIVE EFFECT.

Congress intended that separations orders of the Federal Communications Commission preempt inconsistent state regulation. In *Smith* v. *Illinois Bell Tel. Co.*, 282 U.S. 133 (1930), this Court had held the separation of "intrastate and interstate property, revenues, and expenses" of a carrier's business to be "essential to the appropriate recognition" of the separate Federal and state competencies. *Id.* at 148.

In the 1934 Act Congress sought to achieve national uniformity in separations by authorizing the FCC to classify the property of any telephone company "and determine what property of said carrier shall be considered as used in interstate or foreign telephone toll service", after notice to the affected state commission. Section 221(c), 47 U.S.C. § 221(c) (A. 244a). In 1971 Congress added Section 410(c) to

the Act, making mandatory the states' participation in jurisdictional separations matters.[13] The separations process, the Court recently noted in *Louisiana PSC* v. *FCC*, 476 U.S. 355, 375 (1986), "facilitates the creation or recognition of distinct spheres of regulation", citing *Smith* v. *Illinois, supra*.

The court below properly read this Court's decision in *Louisiana PSC* as recognizing the preemptive effect of the FCC's separations orders. It is undeniable that Federal separations procedures are "an essential prerequisite to the creation of independent spheres of federal and state power over communications" and that "it is only *after* a uniform separations formula has been applied that a state's . . . intrastate ratemaking can be protected from federal preemption." (A. 26a-27a).

The decision in *Louisiana PSC* is an important reaffirmation of the Court's historic insistence that Fed-

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[13] Congress clearly made the political decision that in the separations area the FCC should be *primus inter pares*. Under the statutory joint board procedure, separations issues are to be referred to a Federal-state joint board, composed of three Federal commissioners and four state commissioners. When the joint board's recommended decision goes before the FCC for adoption, the state commissioners may sit with the Federal commission at the hearing and "participate in its deliberations, but not vote" on the recommended decision. Section 410(c), 47 U.S.C. § 410(c) (A. 247a).

In adopting Section 410(c) in 1971, Congress specifically recognized that "the Federal Government preempts the States in the area of Federal jurisdiction" and that inevitably "the determination of the rate base at the Federal level, then, has a strong relation to the rates which are charged at the local level." S.Rept. No. 362, 92d Cong., 1st Sess., 3 (1971), 2 [1971] U.S. Code Cong. & Admin. News 1513.

eral and state commissions respect each other's "distinct spheres of regulation." 476 U.S. at 375. *Louisiana PSC* explicitly recognizes that the Communications Act establishes "a process designed to resolve what is known as 'jurisdictional separations' matters" and implicitly recognizes the FCC's preemptive authority in that area. *Id.* It is only after the jurisdictional separation has been accomplished that Section 2(b)'s protection of the "dual regulatory system" comes into play, *id.* at 370, and nothing the state commission may do within its jurisdiction can revise the boundary separating the two jurisdictions.

As applied to this case, *Louisiana PSC* supports the conclusion that Petitioner PUC may not deviate from "the correct allocation between interstate and intrastate", *id.* at 375, by using interstate revenues in its intrastate rate calculations. *Louisiana PSC* cannot properly be read as insulating state commissions from validly adopted joint board orders.

What the PUC attempted to do in its 1982 rate case order is clearly forbidden under long-standing precedents. The orders below in *Smith* v. *Illinois Bell Tel. Co.*, *supra*, were not dissimilar to the Hawaii commission's attempt here to use interstate revenues to reduce the intrastate revenue requirement. The vice in *Smith* was that the Illinois commission and the district court, in computing the revenue generated by Illinois Bell (IBT)'s investment in Chicago, had counted toward meeting IBT's intrastate revenue requirement *both* the sums IBT had received directly from local users and the share of interstate tolls that AT&T had paid over for the use of IBT's toll line in interstate calling. In reversing, this Court held that

the Illinois commission and the court below had erred in not separating out IBT's intrastate and interstate property, revenues, and expenses.[14] This Court said that it was the Interstate Commerce Commission—then charged with regulating interstate communications—that had "authority . . . to determine the amount of the revenues . . . properly attributable" to the interstate business. "[T]he validity of the order of the state commission can be suitably tested only by . . . the compensation receivable for the intrastate service under the rates prescribed." *Smith, supra,* at 149. In *NARUC* v. *FCC, supra,* the D.C. Circuit read *Smith* to prohibit the state commission from retaining interstate revenues or plant in post-separations calculations, as the Hawaii commission attempted to do below. *See NARUC* v. *FCC, supra,* at 407 n. 18, 737 F.2d at 1112 n. 18; *see also Smyth* v. *Ames,* 169 U.S. 466, 541 (1898) ("the reasonableness or unreasonableness of rates prescribed by a state . . . within its limits must be determined without reference to the interstate business done by the carrier, or to the profits derived from it"); *Minnesota Rate Cases,* 230 U.S. 352, 435 (1913).

The Court's opinion in *Louisiana PSC* clearly assumes that Section 2(b) does not cramp the separations process. *Id.* at 375. Nowhere in *Louisiana PSC* is there any suggestion that the order in a Section 410(c) joint board proceeding should not be binding on both the Federal and state commissions.[15] *Loui-*

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[14] The facts and holding in *Smith* are described in some detail in NARUC v. FCC, 237 U.S.App.D.C. 390, 406, 737 F.2d 1095, 1111 (1984), *cert. denied,* 469 U.S. 1227 (1985).

[15] At the hearing on Respondent's motion for preliminary in-

siana PSC specifically recognizes that the separations procedure established by Section 410(c) of the Act "facilitates the creation or recognition of distinct spheres of regulation" as called for in *Smith* v. *Illinois, supra. Id.* at 375. *Smith* is "based on the limits of state jurisdiction, rather than constraints imposed on federal agencies. . . ." *MCI* v. *FCC,* 242 U.S.App.D.C. 287, 293, 750 F.2d 135, 141 (1984). As Chief Justice Hughes had later pointed out, this jurisdictional "segregation of . . . business was essential in order to *confine* the exercise of *state* power to its own proper province." *Lone Star Gas Co.* v. *Texas,* 304 U.S. 224, 241 (1938) (emphasis supplied). The states would not be so *confined* if they were not *bound* by the outcome of separations proceedings.

That the states are bound by the joint board orders allocating subclasses of revenues and expenses jurisdictionally does not invade the states' prerogative of setting intrastate rates recognized in *Louisiana PSC.* It merely means that the state regulators may pass only on the allowability *vel non* of all costs, etc., properly assigned to the intrastate jurisdiction by the separations process. The states may not ignore recovery of proper intrastate costs nor may they jurisdictionally reassign them. *Louisiana PSC* does not permit the states, with respect to depreciation arising from

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junction, the PUC's counsel stated that the PUC's orders "specifically held that the commission agrees with the company and with the FCC that the separations formula must remain intact for each governmental authority to assert its own jurisdiction." (Tr-2 at 8; *see also* A. 17a-18a, 22a-23a n. 28). In their petition for rehearing in the Ninth Circuit, all Petitioners conceded that "There is no doubt that the FCC has preempted the area of separations rules that . . . prevent state tribunals from 'cooking the books' . . . ." (*Op. cit.* at 7).

plant assigned to intrastate, to evade their responsibility for depreciation charges by reassigning the property to interstate. Similarly, they may not unilaterally "appropriate" interstate revenues.[16]

II. THE FCC'S ORDER MAKING THE JOINT SEPARATIONS MANUAL APPLICABLE TO HAWAII WAS ENFORCEABLE UNDER SECTION 401(b) OF THE ACT.

The Federal Communications Commission's 1981 order, making the Joint Separations Manual applicable to Hawaii,[17] was an "order" judicially enforceable under Section 401(b) of the Communications Act, 47 U.S.C. § 401(b). The literal language of Section 401(b) compels this result:

> If any person fails or neglects to obey *any order of the Commission other than for the payment of money,* . . . the Commission or *any party injured thereby* . . ., may apply to the appropriate district court of the United States for the enforcement of such order.
> * * *

47 U.S.C. § 401(b) (emphasis supplied) (A. 245a).

The Petitioners' claim that the FCC's 1981 order, because non-adjudicatory, is not properly an "order"

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[16] *See* Smyth v. Ames, Minnesota Rate Cases, Smith v. Illinois, *ubi supra.*

[17] Integration of Rates and Services, 87 F.C.C. 2d 18 (FCC81-312) (A. 249a), which (i) decreed that the "NARUC-FCC Separations Manual, which is incorporated by reference into Part 67 of the Commission's Rules and Regulations, SHALL APPLY to Hawaii . . ." and (ii) made conforming changes in Section 67.1(e) of the Commission's rules, 47 C.F.R. § 67.1(e) (A. 249a-50a).

for the purposes of Section 401(b), ignores the structure of the Act. All FCC "orders," including those in non-adjudicatory proceedings, are effective without further action of the commission.[18] Congress used the same phrase, "any order," in providing for judicial review of such matters in the next-following section of the Act.[19] Petitioners' constructional argument would attribute to the draftsman of these sections *in pari materia* the anomalous intent either to withhold judicial review of non-adjudicatory actions by the Commission under Section 402(a) or to withhold enforcement of its judicially affirmed actions under Section 401(b).

The authority in this Court on the enforceability of commission orders is to the contrary. *See Ambassador, Inc.*, v. *U.S.*, 325 U.S. 317, 325 (1945) (§ 401[b]); *CBS* v. *U.S.*, 316 U.S. 407, 417 (1942) (§ 402[a]). Moreover, five other circuits that have considered the question have specifically held that non-adjudicatory orders of the Commission are enforceable under Section 401(b).[20]

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[18] Section 408 provides in pertinent part that "all orders of the Commission, other than orders for the payment of money, shall take effect thirty calendar days from the date upon which public notice of the order is given. . . ." 47 U.S.C. § 408 (A. 246a).

[19] Section 402(a) reads as follows:

> Any proceeding to enjoin, set aside, annul, or suspend *any order* of the Commission under this Act . . . shall be brought as provided [in the Hobbs Act, now 28 U.S.C. § 2344].

47 U.S.C. § 402(a) (emphasis supplied).

[20] *See* Illinois Bell Tel. Co. v. Illinois Commerce Comm'n, 740 F.2d 566, 570-71 (7th Cir. 1984); Chesapeake & Potomac Tel.

Section 401(b) does not admit of a collateral attack on the validity of the FCC's 1981 order. Under the Section 401(b) procedure the district court need determine only "that the order was regularly made and duly served. . . ." Any attack on the merits of the 1981 order should have been made at the time by petition for review under Section 402(a) of the Act, 47 U.S.C. § 402(a). In fact, Chairman Tom of the Hawaii commission sat on the joint board whose recommendation led to the 1981 order, and the commission conceded below that it would be bound thereby. (A. 17a-18a and 23a n. 28; Tr-2 at 8).

III. THE DISTRICT COURT PROPERLY ENFORCED THE FCC'S ORDER.

Having found that the Hawaii PUC had attempted to evade the FCC's 1981 separations order, the district court properly acted to enforce the Federal order.

The court of appeals correctly upheld under Point VI of its opinion the trial court's finding that the

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Co. v. Public Serv. Comm'n, 748 F.2d 879, 880-81 (4th Cir. 1984), *vacated and remanded for proceedings consistent with Louisiana Pub. Serv. Comm'n v. FCC, supra*, 476 U.S. 445 (1986) (per curiam); South Central Bell Tel. Co. v. Louisiana Pub. Serv. Comm'n, 744 F.2d 1107, 1115-16 (5th Cir. 1984), *vacated and remanded for consideration in light of Chesapeake & Potomac, supra*, 476 U.S. 1166 (1986) (mem.); Southwestern Bell Tel. Co. v. Arkansas Pub. Serv. Comm'n, 738 F.2d 901, 907 (8th Cir. 1984), *vacated and remanded for consideration in light of Chesapeake & Potomac, supra*, 476 U.S. 1167 (1986) (mem.); Virginia State Corp. Comm'n v. FCC, 737 F.2d 388 (4th Cir.1984), *rev'd on other grounds sub nom. Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355 (1986); Southwestern Bell Tel. Co. v. Kansas Corp. Comm'n, 10th Cir. No. 84-2296 (decided April 10, 1986); *contra*, New England Tel. & Tel. Co. v. PUC, 742 F.2d 1, 4-7 (1st Cir. 1984), *cert. denied*, 476 U.S. 1174 (1986).

Hawaii commission's intrastate "adjustment" was "a fairly transparent and improper attempt to circumvent the FCC mandate." (A. 27a). "That finding", the court of appeals held, "supports a conclusion that the PUC violated the FCC-imposed Ozark Plan." (App. 29a).[21] As such, that violation satisfies the prerequisite to invocation of Section 401(b), "if any person fails or neglects to obey any order of the Commission other than for the payment of money. . . ."

Petitioners' belated attempt to invoke the doctrines of exhaustion and abstention is misconceived and untimely. Notwithstanding this failure to brief the points below,[22] the application of either doctrine is inappropriate in this case.

By the time the district court was required to take action of substance on Respondent's requests for injunctive relief, all administrative proceedings in Docket 4588 were completed. Consequently, the exhaustion requirement of *Gibson* v. *Berryhill,* 411 U.S. 564, 574 (1973), was satisfied. In *Gibson* the Court noted that abstention under *Railroad Commission* v. *Pullman Company,* 312 U.S. 496 (1941), upon which Petitioners rely, requires a Federal court "to defer in appropriate circumstances to state *judicial* proceedings." *Id.* at 574, n. 13 (emphasis supplied). Here, there were no state judicial proceedings pending at the time the district court acted.

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[21] There is no basis for this Court's disturbing the factual finding of the lower courts. *See* Anderson v. City of Bessemer, 470 U.S. 564, 573-74 (1985); FRCP 52(a).

[22] In none of Petitioners' three briefs before the Ninth Circuit when it decided the appeal below (A. 1a) were the exhaustion, abstention, remedy, or comity questions argued.

Abstention also cannot be justified under principles espoused in *Burford* v. *Sun Oil Company*, 319 U.S. 315 (1943), cited by Petitioners at 27. In *Burford* this Court held that the Federal courts should not intervene in a manner that disrupts a state's effort to establish and administer a unified scheme for review of administrative orders. *Id.* at 333-34. Here, the district court's actions had no such disruptive effect. Although Hawaiian Tel had appealed D&O 8042 to the Hawaii Supreme Court, the appeal was dismissed following the PUC's issuance of Order 8168 on reconsideration (A. 49a-65a), which corrected certain computational errors that were the basis of Respondent's appeal. Dismissal of the state appeal occurred before the district court took any substantive action; therefore, the state's scheme for review of administrative orders was unaffected.[23]

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[23] The chronology of relevant events in the 1982 rate case was as follows:

Aug. 14, 1984—PUC issues D&O 8042 (A. 90a);

Aug. 24, 1984—Hawaiian Telephone files motion for reconsideration;

Sep. 10, 1984—Notice of appeal filed in Hawaii Supreme Court;

Nov. 2, 1984—Hawaiian Telephone files complaint in U.S. District Court for Hawaii (A. 179a);

Nov. 15, 1984—PUC issues Order No. 8168 (correcting certain computational errors) (A. 49a);

Nov. 21, 1984—Hawaiian Telephone files motion to dismiss appeal in Hawaii Supreme Court (A. 205a);

Nov. 23, 1984—PUC issues Order No. 8181 (approving rate schedules);

Dec. 7, 1984—Hawaii Supreme Court dismisses Hawaiian Telephone's appeal;

Dec. 26, 1984—District court issues preliminary injunction (A. 40a);

Mar. 21, 1985—District court issues permanent injunction (A. 169a).

Respondent's dismissal of its state appeal also eliminates concern about the *Pullman* requirement that federal courts abstain in cases where they are required to forecast the determination of unsettled questions of state law. 312 U.S. at 499-500. Respondent's state appeal was based solely on state law grounds (A. 206a-07a), and all state issues were resolved through the correction of computational errors in PUC Order No. 8168 (A. 58a-59a). Thus, when the district court was required to take substantive action on Hawaiian Tel's request for injunctive relief, no state law question essential to adjudication of the Federal claim was pending or remained undecided by state courts or the PUC. The only issues before the district court involved whether the PUC had complied with jurisdictional separations procedures prescribed by the FCC under Section 410(c) of the Communications Act and whether the action filed by Hawaiian Tel was proper under Section 401(b) of the same statute. Abstention protects a core state interest in resolution of state questions; this case presents not a state question but one of Federal uniformity. *Cf. Hawaii Housing Auth.* v. *Midkiff*, 467 U.S. 229, 236 (1984).

The state administrative proceeding having been concluded, Hawaiian Tel was entitled to "bridge over" to the Federal system for vindication of the FCC's preemptive authority to prescribe jurisdictional separations rules and procedures. *See Bacon* v. *Rutland Railway Company*, 232 U.S. 134 (1914); *City Bank* v. *Schnader*, 291 U.S. 24 (1934), cited in *Gibson, supra*, at 574 n. 13; *cf. Willcox* v. *Consolidated Gas Co.*, 212 U.S. 19, 40 (1909). Section 401(b) can be invoked, after all, only in the Federal courts.

Finally, Petitioners' argument that abstention is warranted under *Younger* v. *Harris*, 401 U.S. 37 (1971), is erroneous because, contrary to Petitioners' assertions, PUC Docket 4588 was not a criminal or quasi-criminal proceeding, and the PUC's decision on the separations issue was not grounded on state law regarding equitable estoppel. Ratemaking is a legislative, not an adjudicatory function, *Prentis* v. *Atlantic Coast Line*, 211 U.S. 210, 226 (1908), and PUC Docket 4588 was nothing more than a general ratemaking proceeding. Moreover, the PUC did not purport to adopt the contested separations adjustment to punish Hawaiian Tel for misleading statements, as suggested by Petitioners at 26, but rather to balance the interests of the company and its ratepayers, and to fulfill the PUC's obligation to set fair and reasonable rates. (A. 104a-05a). In the Communications Act, and in Section 410(c) in particular, Congress contemplated concurrent regulation by the FCC and the state regulatory agencies within their "distinct spheres of regulation." This action enforces that Congressionally mandated separation through the remedy expressly provided in Section 401(b) of the Act. Thus, *Younger's* prohibition of Federal court injunctions interfering with critical state proceedings is wholly inapplicable.

Petitioners also argue that the findings of the court below are barred by res judicata. The court of appeals rejected this argument under Point III of its opinion (A. 20a-22a), concluding that because of differences between PUC Dockets 4306 and 4588, "[t]he causes of action are clearly not the same, and res judicata cannot apply." (A. 21a). Under Federal law, res judicata is no bar to adjudication of a different cause of action. *Commissioner* v. *Sunnen*, 333 U.S. 591,

597-98 (1948). The same rule exists under state law as well. *Marsland* v. *International Society*, 66 Haw. 119, 125, 657 P.2d 1035, 1039 (1983), *appeal dismissed*, 464 U.S. 805 (1983). In any event, on such a question this Court should not attempt to second-guess the lower Federal courts.[24]

Further, the Hawaii Supreme Court's decision in *Re Hawaiian Telephone Company*, 67 Hawaii 370, 689 P.2d 741 (1984) (A. 66a), provides no basis for application of collateral estoppel to the district court's actions. As discussed *supra*, no question of *state* law was common to the state court's 1984 decision and the district court action below. And, although the Hawaii Supreme Court considered the issue of Federal preemption in its decision, that court's construction of the Communications Act cannot foreclose direct vindication of Federal regulation in the Federal courts under Section 401(b). *See Jefferson* v. *Gypsy Oil Company*, 27 F.2d 304, 306 (8th Cir. 1928); *Smayda* v. *U.S.*, 352 F.2d 251, 253 (9th Cir. 1965), *cert. denied*, 382 U.S. 981 (1966); *cf. Western Air Lines* v. *Board*, 107 S.Ct. 1038, 1043 (1987).

CONCLUSION

For the reasons set forth above and in the opinion of the court below, the petition for certiorari should be denied.

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[24] *See* U.S. v. Hohri, 96 L.Ed.2d 51, 61 n. 6 (1987); Regents v. Ewing, 474 U.S. 214, 224 n. 10 (1985), *quoting* Propper v. Clark, 337 U.S. 472, 486-87 (1949); Chardon v. Fumero Soto, 462 U.S. 650, 654 n. 5 (1983); Brockett v. Spokane Arcades, 472 U.S. 491, 499-500 (1985); Bishop v. Wood, 426 U.S. 341, 346 n. 10 (1976).

Respectfully submitted,

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March 2, 1988

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APPENDIX

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

HAWAII TELEPHONE COMPANY, a Hawaii Corporation, *Plaintiff-Appellee,* -vs- PUBLIC UTILITIES COMMISSION OF STATE OF HAWAII; ALBERT TOM, Chairman SUNAI KIDO, Commissioner; and CLYDE S. DUPONT, Commissioner, *Defendants,* CONSUMER ADVOCATE, the Director of the Department of Commerce and Consumer Affairs, State of Hawaii *Intervenor-Defendant-Appellant*	FILED Jan. 13, 1988 CATHY A. CATTERSON, Clerk U.S. Court of Appeals CA No. 85-1907/1908 DC No. C-84-1306-SPK O R D E R

BEFORE: FERGUSON, CANBY AND HALL, CIRCUIT JUDGES.

A majority of the panel has voted to deny the petition for rehearing and suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote to rehear the matter en banc.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

LIST OF PRINCIPAL GTE SUBSIDIARIES PURSUANT TO RULE 28.1

In compliance with the Court's Rule 28.1, following is a listing of Respondent's parent company and its principal subsidiaries:

GTE CORPORATION

- GTE Service Corporation
- GTE Products of Connecticut Corporation
    - GTE Government Systems Corporation
    - GTE Communications Systems Corporation
    - GTE Products Corporation
    - GTE Laboratories Incorporated
    - GTE International Incorporated
        - GTE Sylvania S.p.A.
        - GTE Sylvania Licht, GmbH
        - Siemens Telecommunication International, Inc.
- GTE Communications Services Incorporated
    - GTE Sprint Communications Corporation
    - GTE Spacenet Corporation
        - Telenet Incorporated
        - Telenet Support Services Incorporated
    - GTE Valenite Corporation
    - Anglo-Canadian Telephone Company
        - British Columbia Telephone Company
            - Microtel Limited
            - Canadian Telephones and Supplies Ltd.
        - Dominion Directory Company Limited
        - Compania Dominicana de Telefonos, C. por A.
        - Quebec - Telephone

GTE Alaska Incorporated
GTE California Incorporated
GTE Florida Incorporated
GTE North Incorporated
GTE Northwest Incorporated
GTE West Coast Incorporated
GTE South Incorporated
GTE Southwest Incorporated
GTE Hawaiian Telephone Company Incorporated
The Micronesian Telecommunications Corporation
GTE Data Services Incorporated
GTE Directories Corporation
GTE Finance Corporation
GTE Finance N.V.
GTE Export Factoring Company B.V.
GTE Global Corporation
GTE Investment Management Corporation
GTE Mobilnet Incorporated
GTE Realty Corporation
GTE Reinsurance Company Limited
GTE Shareholder Services Incorporated
GTE Telecom Incorporated
GTE Airfone Incorporated
GTE TeleMessager Incorporated

A more complete list of GTE subsidiaries has been filed with the Clerk by letter.

No. 87-1152

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

PUBLIC UTILITIES COMMISSION OF THE STATE OF HAWAII; ALBERT TOM, *Chairman;* SUNAO KIDO, *Commissioner; and* RUSSEL S. NAGATA, *Director of the Department of Commerce and Consumer Affairs, State of Hawaii, and Consumer Advocate,*

Petitioners,

v.

HAWAIIAN TELEPHONE COMPANY, *a Hawaii Corporation,*

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

ARGUMENT

Our petition shows the lower court's decision[1] overturning Hawaii Public Utilities Commission (PUC) orders in Docket 4588, and guaranteeing respondent (HawTel) an intrastate rate of return of 11.25 per cent, instead of the 10.15 per cent the PUC granted, eviscerates the Johnson Act (Pet. 17, 20-22); misconstrues the effect of the Communications Act and the FCC's 1981 separations order (*id.* 17-22); and misapplies 47 U.S.C. § 401(b), placing the Ninth Circuit in conflict with the First (Pet. 18-19). The lower court also erred more basically: one, by misperceiving the state court affirmance in Docket 4306 (Haw. appeal No. 9343, Pet. App. 66) (*HawTel I*), and ignoring the dismissal of HawTel's appeal in Docket 4588 (Haw. appeal No. 10169, Pet. App. 203-08, 213 n.1), creating not just a conflict, but a double breach of both the Full Faith and Credit Act (Pet. 22-25) and the *Feldman* doctrine (*id.* 24-25); two, on its view that litigation was open, by overlooking abstention (*id.* 25-28); and three, by violating justiciability rules that bar premature adjudication (*id.* 28-29) and overbroad remedial orders (*id.* 29-30). HawTel's defense of the decision below as "well-reasoned" and raising "no important issue" (Resp. Br. at 5, 6), proves why the writ should be granted.

HawTel labors to prove an irrelevant point. There is no dispute that by FCC order No. 81-312 "the NARUC-FCC Separations Manual . . app[ies] to Hawaii." Pet. App. 249-50. Nor need this Court reject, for state court takings cases, a claim that "Congress intended that separations

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[1] The petition for rehearing below was denied on January 13, 1988. Resp. App. 1. This Court is fully authorized to act. *See FCC v. League of Women Voters*, 468 U.S. 364, 373 (1984).

orders of the Federal Communications Commission preempt inconsistent state regulation" (Resp. Br. 6, 10 n.15). That issue is not present because HawTel did not appeal to this Court from *HawTel I* (where the rate adjustment was first upheld), and abandoned state appeal No. 10169, where the PUC order here was at issue. Resp. Br. at 15 n.23. Our petition is not about state court takings cases, but about federal district courts launching preemptive strikes that make such state court litigation meaningless.

What HawTel ignores is that it follows neither from the Communications Act nor the FCC order that a federal district court may force a state commission to grant an 11.25 per cent rate of return on the federally-defined intrastate ratebase. This is particularly so when that return under state law is undeserved because revenue demands yielding the requested rate breached "understandings . . . between the State and [the utility]" whereby the utility was deemed to have agreed to subsidize intrastate rates in exchange for ratepayer support of the utility's agenda elsewhere. D&O 8042, Pet. App. 100.[2]

Nor does it follow that, having abandoned state proceedings and review here, HawTel "was entitled to 'bridge over' to the Federal system," or that comity, abstention, and justiciability "cannot foreclose direct vindication of Federal regulation in the Federal courts under Section 401(b)" (Resp. Br. 16, 18). Such "anti-comity" claims confess the decision below merits this Court's review.

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[2] *See* Order 8168, Pet. App. 51; *see also In re Hawaiian Telephone Co.*, 67 Haw. 370, 375-76 & nn.4-7, 383-84 & n.13, 689 P.2d 741, 745 & nn.4-7, 750 & n.13 (1984), Pet. App. 66, 73-74, 84 (cataloguing HawTel officers' representations). HawTel (Resp. Br. 10 n..15) egregiously misquotes our petition for rehearing (*see* Ex. D at 7, App. for Ext. of Time, No. A-424) (U.S. filed Nov. 24, 1987), which states that the separations formulas are relevant only if a state agency is seeking to avoid a taking claim by viewing the rate base "through the lens of state law." As noted, that is not going on in this action.

A. The Ninth Circuit's Decision Defies the Johnson Act and the Communications Act.

HawTel's reasons why neither the Johnson Act nor the "express jurisdictional limitations on FCC power," *Louisiana PSC v. FCC*, 476 U.S. 355, 370 (1986), barred relief, confirm that the decision here breached these limits.

HawTel devotes its brief largely to proving the importance of FCC-prescribed separations formulas (Resp. Br. 6-10 (citing, *e.g.*, *Lone Star Gas Co. v. Texas*, 304 U.S. 224 (1938); *Smith v. Illinois Bell Tel.*, 282 U.S. 133 (1930); *Minnesota Rate Cases*, 230 U.S. 352 (1913); *Smyth v. Ames*, 169 U.S. 466 (1898))). While HawTel's seeming purpose is to show the formulas have force independent of their roles in a taking inquiry,[3] the effort fails. None of the cases show that a failure to apply the FCC rules, *simpliciter*, gives rise to anything other than a claim to redress an unlawful taking or breach of due process (if that). Rather, these cases refute HawTel's claim, for they involve the very attacks that can be heard originally only in state court. *See e.g.*, *Smith*, 282 U.S. at 142.

HawTel is wrong in claiming (Resp. Br. 7-9) that *Louisiana PSC* is to the contrary. *Louisiana* affirms that "distinct spheres of regulation" generate special rules in taking cases, 476 U.S. at 375, and the Court's discussion of separations should be read mainly as proving how Congress has denied federal power to regulate intrastate rates. *Id.* at 375-76. The Act, as *Louisiana* holds, does not bar a state from setting a low intrastate rate because it has misallocated interstate costs. The Taking Clause may remedy the wrong. But preemption is not a bar.

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[3] Indeed, the premise that the Johnson Act allows injunctions on preemption claims relies on the flawed idea of a "two tiered system of constitutional rights." *Memphis Community School Dist. v. Stachura*, 106 S. Ct. 2537, 2544 (1986)

The most serious flaw in HawTel's reasoning, however, is its notion that intrastate rates are nullified, no matter what justifications support them, if they have " 'the effect' " of misapplying separations rules (Resp. Br. at 4), and that a court may conclude, from such a "factual finding," that stated proper purposes are not the ones motivating the agency (*id.* at 13-14).

It was error to look behind the PUC's express and facially proper findings. "[I]nquiry into legislative motive is often an unsatisfactory venture"; thus a state's "avowed purpose" in a preemption case is to be taken at face value. *Pacific Gas & Elec. Co. v. Energy Resources Comm'n*, 461 U.S. 190, 216 (1983). That purpose here was to avoid injustice threatened when HawTel, having gotten State support for the AT&T agreement by implying it would use transition funds to subsidize intrastate rates, then asked for large intrastate increases. *Supra* note 2. These reasons should have ended the case. *See Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229, 242-43 (1984).

Instead, the district court altered D&O 8042 to create a federal issue, transforming a rate of return adjustment into a rate base adjustment. The court below compounded the error by viewing the "predominantly legal" issue of preemption, *Pacific Gas*, 461 U.S. at 201, as one of fact. In short, HawTel may have had a taking claim, but its remedy was to seek review in state court and on appeal here. The adage "that 'two wrongs do not make a right.' " *Gray v. Mississippi*, 107 S. Ct. 2045, 2054 (1987), should have kept the courts below out of the fray. Certiorari should issue to correct this evasion of the Johnson Act and the lower court's erroneous preemption analysis.

The mischief below also shows why HawTel's claims should not have been heard because jurisdiction was absent under 47 U.S.C. § 401(b). HawTel's wrong view of the PUC's decision as "a collateral attack on . . . the FCC's 1981 order" and improper claim that the courts below

"acted to enforce the Federal order" (Resp. Br. 13) support the holding that Congress neither placed "interpretation of [a] rule's scope and meaning . . . in the hands of private parties and some 700 federal district judges," nor allowed "issue splitting," such as that here, occasioned when litigants carve rule-based preemption claims out of state proceedings. *New England Tel. & Tel. Co. v. PUC*, 742 F.2d 1, 6-7 (1st Cir. 1984), *cert. denied*, 476 U.S. 1174 (1986). HawTel's claims supporting § 401(b) jurisdiction were all rejected by the First Circuit. HawTel offers no reason why this conflict ought not be reviewed.

B. The Ninth Circuit Should Have Reversed the Injunction Under Precepts of Comity, Abstention, and Justiciability.

1. Relitigation was Barred.

HawTel has no good answer to the claim that refusal to bar relief given the affirmance in PUC Docket 4306 (Haw. appeal No. 9343) (*HawTel I*), or the order dismissing appeal in Docket 4588 (Haw. appeal No. 10169) defied the rule that "a federal court must give the same preclusive effect to a state-court judgment as another court of that State would give," *Parsons Steel, Inc. v. First Alabama Bank*, 474 U.S. 518, 523 (1986) (citing cases). HawTel's response is the startling claim that preclusion is inapplicable when a litigant pursues "direct vindication of Federal regulation in the Federal courts under Section 401(b)" (Resp. Br. 18). Nothing HawTel cites supports this.

HawTel I's effect raises state law issues that ought be decided by courts familiar with them. The panel did not address these issues, however, and when, as here, a federal court does not acknowledge state law controls, this Court grants review and remands. *Parsons Steel*, 474 U.S. at 526; *Marrese v. American Academy*, 470 U.S. 373, 386-87 (1985); *Migra v. Warren School Dist.*, 465 U.S. 75, 87 (1984). Because state law may moot the federal issues

here, the Court may wish to certify the issue of *HawTel I*'s effect under Haw. R. App. P. 13, or remand to the court below and instruct it to do so. *Virginia v. American Booksellers Ass'n*, 56 U.S.L.W. 4113, 4117 (U.S. Jan. 25, 1988) (citing *Bellotti v. Baird*, 428 U.S. 132 (1976)).

HawTel's discussion of its forfeited appeal in No. 10169 counsels the same result if not reversal. HawTel concedes it "appealed D&O 8042 to the Hawaii Supreme Court, [and] the appeal was dismissed . . . before the district court took any substantive action" (Resp. Br. 15). HawTel has no response to our claim that the order of dismissal is *res judicata*. Although HawTel presented "only state law grounds" on appeal, (Resp. Br. 16), state law condemns the claim splitting HawTel seeks.[4]

State law aside, relief is barred since the courts below had "no authority to review final judgments of a state court in judicial proceedings." *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 482 (1982). Suggesting *Feldman* is inapt since "[r]atemaking is . . . legislative" (Resp. Br. 17), HawTel ignores that the judgments upset are those of our state supreme court. The claims HawTel litigated in *HawTel I*, and could have pursued, but forfeited, in appeal No. 10169, required a *court* "to investigate, declare, and enforce 'liabilities as they [stood] on present or past facts and under laws supposed already to exist.' " 460 U.S. at 479. Even if one wrongly assumes *HawTel I* does not work as a bar, HawTel's failure to seek rulings on federal claims in appeal No. 10169 "forfeited [its] right to obtain review . . . in any federal court." 460

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[4] *Santos v. State*, 64 Haw. 648, 652, 646 P.2d 962, 965 (1984) (citing cases); *Lundberg v. Stinson*, 5 Haw. App. 394, 399-400, 695 P.2d 328, 333-34 (1984). HawTel also provides no answer how *University of Tennessee v. Elliott*, 106 S. Ct. 3220 (1986), does not bar review of the PUC findings, concerning, *e.g.*, HawTel's representations or the benefits flowing from the AT&T agreement.

U.S. at 484 n.18. Given this glaring jurisdictional defect, HawTel's losses and forfeitures doubly counsel review here.

2. The Grouds for Abstention Were Compellingly Present.

HawTel's reasons why, *if* relitigation was not barred, abstention was not required, are patently wrong. The notion that abstention was waived (Resp. Br. 14 & n.22) is meritless. Petitioners pleaded comity defenses (Pet. App. 196), and urged abstention in the district court (*id.* 209), in the court below in Johnson Act claims, and in the petition for rehearing (Resp. Br. 14 n.22). *Ohio Civil Rights Comm'n v. Dayton Christian Schools*, 106 S. Ct. 2718, 2722 (1986), where abstention, argued to the district court, was not raised until oral argument here, bars a waiver a fortiori. As argued in our petition for rehearing below, and here (Pet. 25-26) since we have throughout attacked jurisdiction and relitigation, if those attacks lack merit a federal court is bound "to decide the propriety of a federal court injunction under the general principles of equity, comity, and federalism."[5]

HawTel's claim that *Younger* is "wholly inapplicable" to its claims (Resp. Br. 17) is untenable. The Johnson Act does not exhaust "principles of federal equity." *Rosewell v. LaSalle National Bank*, 450 U.S. 503, 525-26 n.33 (1981); *Alabama PSC v. Southern Ry. Co.*, 341 U.S. 341, 350 (1951). The claim that *Younger* is inapt because ratemaking is not "adjudicatory" (Resp. Br. 17) ignores state law,

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[5] *Parsons Steel*, 474 U.S. at 526; *see Dayton*, 106 S. Ct. at 2722; *Hickey v. Duffy*, 827 F.2d 234, 238 (7th Cir. 1987). *Pullman* (and *Burford*) are not waivable. *Ohio Bureau of Employment Servs. v. Hodory*, 431 U.S. 471, 480 n.11 (1977).

HawTel's waiver arguments are further diminished insofar clarification that *Younger* applies to agency proceedings, *Dayton*, and the "types of abstention are not rigid pigeonholes into which federal courts must try to fit cases," *Pennzoil Co. v. Texaco, Inc.*, 107 S. Ct. 1519, 1526 n.9 (1987), occurred after this case was first submitted. *See St. Louis v. Parapotnik*, 56 U.S.L.W. 4201, 4203-04 (U.S. Mar. 2, 1988).

Haw. Rev. Stat. § 269-16(b) (Pet. App. 226), and *Dayton*'s rule that agency processes vindicating regulatory interests are subject to *Younger*. Indeed, HawTel admits state *judicial* proceedings had commenced "before the district court took any substantive action" (Resp. Br. 15). *See Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 238 (1984). HawTel all but concedes it did not escape *Younger* by aborting its appeal (*see* Pet. 27), and, while viewing charitably its own conduct, does not really deny that important state interests are present (Resp. Br. 17).

HawTel's claim that *Burford* is inapt because relief here left "unaffected" our "scheme for review" (Resp. Br. 15), is even flimsier. If further state review of HawTel's preemption claim was not barred, a run to federal court clearly "disrupts [the] state's effort for review" (Resp. Br. 15) by making those available processes pointless. HawTel, moreover, misstates *Burford* as protective of state procedures and nothing more. The doctrine at its core insulates "basic problems of [state] policy," when, and if, as here, the state provides "a unified method for the formation of policy and determination of cases." 319 U.S. at 332, 333; *see Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 122 n.32 (1984); *Colorado River District v. United States*, 424 U.S. 800, 815 (1976). On HawTel's own view, the federal issue here, like the taking claim in *Alabama PSC v. Southern Ry. Co.*, 341 U.S. 341 (1951), depends on a "predominantly local factor," *id.* at 347, namely whether the rate reduction reflected Hawaiian precepts of good faith and fair dealing (*see* Resp. Br. 14). *Burford* requires this policy issue to be heard, if at all, in state court.[6]

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[6] That HawTel might have persuaded the state court that the adjustment was not justified under Haw. Rev. Stat. 269-16(a), suggests, as Judge Ferguson argued, Pet. App. 35 n.2, that a *Pullman* stay also was warranted. *Pennzoil*, 107 S. Ct. at 1526 n.9.

HawTel thus offers no good argument against abstention. Since the very important *Pennzoil* decision was not handed down until after the case was submitted, this Court may wish to grant the petition, and remand for further proceedings. *See Yates v. Aiken*, 108 S. Ct. 534, 536 (1988). In any case review should be granted to effect comity doctrines that have long barred frustration of regulatory regimes such as those here.

3. Article III Barred Relief.

Given the "special obligation" to notice jurisdictional defects, *Bender v. Williamsport Area School District*, 475 U.S. 534, 541 (1986), HawTel does little to rebut our claim that the relief here was both premature, and overbroad (Pet. 28-30). Both defects are clearly present.

HawTel papers over ripeness defects by confusing ripeness with exhaustion of remedies (Resp. Br. 14 & n.22). *Williamson County v. Hamilton Bank*, 473 U.S. 172 (1985), defines ripeness as a discrete hurdle. The issue is not whether the PUC decision was "unlawful or otherwise inappropriate," but "whether the initial decisionmaker has arrived at a definitive position on the issue that inflicts an actual, concrete injury," *Id.* at 193. Here, the panel reshaped HawTel's claim as one about the post-1985 effects of the intrastate tariff (Pet. App. 21-22). But in transposing the issue to "this new setting" (*id.*), the panel overturned an order the PUC did not issue, *i.e.*, one rejecting a claim that HawTel in 1985 would so suffer that the rate reduction ought be abated. This claim was not addressed in Docket 4588 since HawTel did not adduce proper evidence (Pet. App. 55, 102-03). There was no "meaningful application." *MacDonald v. Yolo County*, 106 S. Ct. 2561, 2568 n.8 (1986). *See also Pennell v. City of San Jose*, 56 U.S.L.W. 4168, 4170-71 & nn.5, 7 (U.S. Feb. 24, 1988).

HawTel's claims also prove the lower courts went too far. Even if all it argues is true, and all else we claim is

wrong, HawTel is entitled only to a ban on "use [of] interstate revenues to reduce the intrastate revenue requirement" (Resp. Br. 8). It is not entitled to a set return, for the PUC may properly reevaluate costs "assigned to the intrastate jurisdiction" (*id.* 10), or clarify its order so not even HawTel could complain. *Pacific Gas*, 461 U.S. at 216. States " 'should be preempted . . . "only to the extent necessary" '." *DeCanas v. Bica*, 424 U.S. 351, 358 n.5 (1976). The Act does not require States, acting in their sphere, to grant "sufficient revenues," let alone an 11.25 per cent return. *Louisiana*, 475 U.S. at 376.

CONCLUSION

For the reasons above and those presented in the petition for certiorari, the writ should be granted.

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(5)

No. 87-1152

In the Supreme Court of the United States

OCTOBER TERM, 1987

PUBLIC UTILITIES COMMISSION OF
THE STATE OF HAWAII, ET AL., PETITIONERS

v.

HAWAIIAN TELEPHONE COMPANY

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*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT*

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether, in a suit brought pursuant to Section 401(b) of the Communications Act of 1934, 47 U.S.C. 401(b), the district court correctly concluded that the Hawaii Public Utilities Commission had not followed an order of the Federal Communications Commission separating the costs of the Hawaiian Telephone Company between interstate and intrastate uses and properly ordered an adjustment of the company's intrastate rates to correct that failure.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

1. a. The Communications Act of 1934 establishes a system of dual federal and state regulation over telephone service. The Act authorizes the Federal Communications Commission (FCC) to regulate interstate and foreign service, but it reserves to the states the authority to set rates for intrastate service. 47 U.S.C. (& Supp. III) 151, 152(b); see *Louisiana Pub. Serv. Comm'n* v. *FCC,* 476 U.S. 355, 360 (1986). This seemingly "clean parceling of responsibility" is complicated by that fact that "virtually all telephone plant that is used to provide intrastate service is also used to provide interstate service" (*ibid.*). For that reason, and because rates are designed to provide a telephone company's "revenue requirement," which is the sum of a carrier's reasonable expenses plus a return on its investment in the

property used in providing telephone service, it is necessary to separate and allocate to the appropriate jurisdiction (intrastate or interstate) the costs of telephone equipment before rates for each jurisdiction are set. *Smith* v. *Illinois Bell Tel. Co.*, 282 U.S. 133 (1930). The Communications Act authorizes the FCC to separate and allocate the costs of telephone equipment to the appropriate jurisdiction. 47 U.S.C. 221(c), 410(c).[1] Since 1970, separations for carriers in the 48 contiguous states have been governed by the FCC's "Ozark Plan." See *Separation Procedures*, 26 F.C.C. 2d 247 (1970).

Until recently, most carriers who jointly provided interstate service negotiated settlements to divide the interstate revenues in an equitable manner.[2] Settlements generally were based on the costs of the participating carriers as determined pursuant to the Commission's jurisdictional separations procedures. Thus, in settling with an independent local exchange carrier for interstate service, the American Telephone and Telegraph Company (AT&T) typically would pay that carrier's interstate expenses (as determined by separations procedures) plus a return on that carrier's interstate investment (similarly determined).

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[1] To illustrate how ratemaking works, suppose a telephone company bought a telephone booth for $20,000 and the FCC allocated 80% of its cost to the intrastate jurisdiction. If the state commission agreed that the telephone booth was a reasonable expense and that $20,000 was a reasonable price (see Pet. App. 27a n.30), there would be a $16,000 increase in the carrier's investment in property providing intrastate service in the first year the booth was used. If the carrier's rate of return is 10%, it would be entitled to increase its intrastate rates by $1,600 to provide a return on its investment in the telephone booth. It would also be entitled to a depreciation expense. If the state commission decided that the telephone booth should last 20 years and used straight-line methods, the annual depreciation expense would be $1,000 and $800 would be added to the carrier's annual intrastate revenue requirement as an expense.

[2] Although settlements still take place in some communications contexts, the FCC recently replaced them with a system of "access charges" for purposes of most telephone services. Under the access charge procedure, long-distance carriers (and some other users) pay local exchange carriers an access charge for the use of the local exchanges, rather than sharing revenues through a settlements process. See *National Ass'n of Regulatory Util. Comm'rs* v. *FCC*, 737 F.2d 1095 (D.C. Cir. 1984), cert. denied, 469 U.S. 1227 (1985).

b. Interstate rates in the 48 contiguous states have traditionally been set so that rates are uniform for given distances and durations of long distance calls. Until the advent of satellite communications, the cost of calls to and from Hawaii and Alaska was about three times higher than the cost for calls of similar distance and duration on the mainland (Pet. App. 5a, 97a). With the advent of satellite communications, which generally do not increase in cost as the distance of the call increases, the FCC in the early 1970s saw an opportunity to integrate Hawaii and Alaska into the nationwide rate structure.[3] Until that time, the Commission had not established separations procedures that were applicable to Hawaii and Alaska. Instead, petitioner, the Hawaii Public Utility Commission (PUC), had used its own "Hawaiian Plan II" to determine the intrastate costs of respondent, the Hawaiian Telephone Company. AT&T had made interstate settlement payments to the Hawaiian Telephone Company based on the Hawaii PUC's separations decisions.

In 1981, in conjunction with transitional procedures for integrating Hawaii into the nationwide rate structure, the FCC approved the recommendation of a joint board (on which the Chairman of the Hawaii PUC served (Pet. App. 130a n.*)) that the separations procedure set forth in the Ozark Plan be applied in Hawaii without modification (*id.* at 249a-250a). Because interstate rates for calls to and from Hawaii had been three times higher than rates for comparable calls on the mainland, integration was expected "to yield significantly lower interstate phone rates" (*id.* at 6a). However, because application of the Ozark Plan separations procedures would allocate more costs to the in-

[3] See *Domestic Communications-Satellite Facilities*, 35 F.C.C. 2d 844, 856-859, reconsideration denied, 38 F.C.C. 2d 665, 692-697 (1972). The FCC in that proceeding adopted a policy of conditioning any grants of domestic satellite authorizations on the carriers' undertaking to reduce rates to and from remote areas promptly so as "to integrate these * * * points into the uniform mileage rate pattern that now obtains for the contiguous states." 35 F.C.C. 2d at 857. See also *Integration of Rates and Services*, 61 F.C.C. 2d 380 (1976), reconsideration denied in part, 65 F.C.C. 2d 324 (1977).

trastate side, there was also expected to be "upward pressure on intrastate rates" (*ibid.*).[4] "To avoid a dramatic impact on local rates" (*ibid.*), the Hawaiian Telephone Company and AT&T proposed that the third and final step of rate integration be deferred to January 1, 1985, and the FCC approved the proposal (*id.* at 6a-7a, 264a). Between 1981 and 1984, while integration remained incomplete and separations were made according to the Ozark Plan, AT&T agreed to make "transitional supplement" payments to the Hawaiian Telephone Company in addition to regular settlement payments (*id.* at 7a).[5]

2. a. About one month after the FCC approved the agreement between the Hawaiian Telephone Company and AT&T, the Hawaiian Telephone Company filed an application with the Hawaii PUC to increase its intrastate rates by about $48 million annually (Pet. App. 123a). This application, which is the first of two applications relevant here, was decided using 1982 as the test year (*id.* at 124a). During 1982, AT&T's transitional supplement payment to the Hawaiian Telephone Company was about $38 million (*id.* at 131a). The Hawaii Consumer Advocate (a petitioner along with the Hawaii PUC) contended that the transitional supplement should be treated as intrastate revenue (*ibid.*), which would reduce considerably the amount of any intrastate rate increase. The Consumer Advocate particularly noted that the Hawaiian Telephone Company had stated, in

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[4] For example, using the figures in note 1, *supra*, if 80% of the cost of a $20,000 telephone booth that is expected to last 20 years is allocated to the intrastate jurisdiction and the intrastate rate of return is 10%, the telephone company is entitled to intrastate rates providing a $1,600 return on this part of its investment (10% × 80% × $20,000) and a depreciation expense of $800 (80% × $1,000) for the first year of its use, for a total of $2,400. If 90% of the cost of the booth is allocated to the intrastate jurisdiction and the rate of return is held at 10%, the company would be entitled to a return of $1,800 (10% × 90% × $20,000) and an expense of $900 (90% × $1,000), for a total of $2,700. Thus, allocating 10% more of the cost of the booth to intrastate service would lead to a $300 increase (12½%) in intrastate rates.

[5] The transitional supplement payments were "based on a declining percentage of the cumulative total growth over 1979 in actual * * * interstate revenues" (Pet. App. 253a).

order to gain the support of the Governor for its agreement with AT&T, that the agreement's provision of transitional supplement payments would reduce the need for intrastate rate increases (*id.* at 132a). The Hawaiian Telephone Company, while contending that the transitional supplement payments were interstate rather than intrastate revenues (*id.* at 131a-132a), nevertheless stated that it had reduced its proposed intrastate rate increase from $101 million to $48 million because of the transitional supplement payments (*id.* at 155a (dissenting opinion)).

The Hawaii PUC first concluded, contrary to the Consumer Advocate, that the transitional supplement payments were plainly interstate revenues and that "[t]he use of interstate revenues to satisfy intrastate revenue requirements would violate the fundamental principles of jurisdictional separations" (Pet. App. 132a). However, it also concluded that "the record is clear that if the State of Hawaii, through its Governor, had not supported the negotiated settlement, the Agreement between AT&T and [the Hawaiian Telephone Company] would not have been approved by the FCC" (*id.* at 133a). Had the settlement not been approved, the PUC concluded, then separations would have been made according to Hawaiian Plan II rather than the Ozark Plan. The effect of using the Ozark Plan, it further found, was that, on paper, "the intrastate rate of return under present rates is reduced by 1.1%" (*ibid.*).[6] Finding that "it would be totally unjust and unreasonable if [the Hawaiian Telephone Company] after obtaining the benefit of the transitional revenues were *also* to receive * * * the difference between

[6] An increase in the percentage of telephone equipment allocated to the intrastate jurisdiction leads to a decrease in a carrier's rate of return in the absence of an increase in the carrier's revenues. For example, using the figures in notes 1 and 4, *supra*, if 80% of the cost of a $20,000 telephone booth is allocated to the intrastate jurisdiction, and the rate of return is 10%, the carrier is entitled to rates providing $1,600 in revenues. But if 90% of the cost of the booth is allocated to the intrastate jurisdiction, and revenues are held constant at $1,600, the rate of return would be 8.9% ($1,600 / $18,000). Thus, in the absence of an increase in the carrier's revenues, the rate of return would decline by 1.1% as a result of shifting more of the cost of the telephone booth to the intrastate jurisdiction.

Hawaiian Plan II and the Ozark Separation formulas" (*id.* at 138a (emphasis in original)), the PUC decided to reduce the Hawaiian Telephone Company's rate of return by 1.1%.[7]

The Hawaii Supreme Court affirmed (Pet. App. 66a-89a). Noting that "[t]he rate award was obviously shaped to take account of uncommon circumstances" (*id.* at 83a), the court saw "no reason to disturb the pragmatic adjustment" made by the Hawaii PUC (*id.* at 89a).

b. Before the Hawaii Supreme Court had ruled on its rate request for test year 1982, the Hawaiian Telephone Company filed a second rate increase request, using 1983 as the test year (Pet. App. 90a). The PUC reaffirmed its "decision that the transitional supplement revenues cannot be treated as intrastate revenues" (*id.* at 101a). It explained that in its previous decision it "made no shift in expenses from intrastate to interstate," but instead "made an *appropriate adjustment* to provide reciprocal benefits to the ratepayers as a result of the State of Hawaii's, and in turn the ratepayers' support of the transitional agreement between [the Hawaiian Telephone Company] and AT&T" (*ibid.* (emphasis in original)). It decided again to reduce the Hawaiian Telephone Company's rate of return by 1.1%, "emphasiz[ing] the fact that by making such an adjustment, we are not substituting the Hawaiian Plan II for the Ozark Plan for ratemaking purposes" (*id.* at 105a). The PUC recognized that transitional supplement payments would cease in 1984 and that its decision would not be implemented until 1985 (*id.* at 102a), but nevertheless took the transitional supplement into account because "1983 is the test year" (*id.* at 103a). The result was a decrease in intrastate revenues of $10.5 million (*id.* at 55a).[8]

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[7] One member of the Hawaii PUC dissented on the basis that its "backdoor use of interstate revenues" (Pet. App. 157a) was "not within [the PUC's] authority" (*id.* at 160a).

[8] The same commissioner who had dissented previously dissented again, stating that "[d]espite the protestations to the contrary, the majority continues to undercut the Ozark Plan which it ostensibly adopts" (Pet. App. 120a). As relevant here, the PUC affirmed its prior decision on motion for reconsideration (*id.* at 49a-65a).

3. a. The Hawaiian Telephone Company then filed this action in the United States District Court for the District of Hawaii.[9] It brought suit pursuant to Section 401(b) of the Communications Act, 47 U.S.C. 401(b), which provides that "[i]f any persons fails or neglects to obey an order of the Commission," the district courts "shall enforce obedience to such order by a writ of injunction or other proper process." The Hawaiian Telephone Company argued that the Hawaiian PUC was failing to comply with the FCC's order that Ozark Plan separations procedures be used in Hawaii, but was instead making intrastate rate determinations based on Hawaiian Plan II separations.

As a preliminary matter, the district court determined that the Hawaiian Telephone Company's action was not barred by the Johnson Act, 28 U.S.C. 1342, which provides in pertinent part that "[t]he district courts shall not enjoin, suspend or restrain the operation of, or compliance with, any order affecting rates chargeable by a public utility and made by a State administrative agency or rate-making body" where "[j]urisdiction is based solely on diversity of citizenship or repugnance of the order to the Federal Constitution." The district court noted that the Johnson Act "by its own terms applies only when jurisdiction is founded *solely* on diversity of citizenship or repugnance to the Federal constitution," whereas "[h]ere, [the Hawaiian Telephone Company's] claim arises under 47 U.S.C. § 401(b)" (Pet. App. 45a (emphasis in original)). The court also concluded that the denial of its first rate increase request did not bar the Hawaiian Telephone Company's challenge to rates for a subsequent year (*ibid.*).

On the merits, the district court concluded that "[n]otwithstanding the PUC's disclaimer of any such action, the PUC's action had the effect of applying Hawaiian Plan II * * * instead of the Ozark Plan as a basis for separations. The so-called 'appropriate adjustment' made by the PUC * * * was calculated solely and precisely on the difference between

[9] The Hawaiian Telephone Company initially appealed the second Hawaii PUC decision to the Hawaii Supreme Court, but dismissed that appeal after obtaining relief from the PUC on reconsideration on several issues not relevant here.

Hawaiian Plan II and the Ozark Separations formulas. * * * Because the PUC's 1.1% 'appropriate adjustment' * * * was directly the product of applying Hawaiian Plan II for purposes of separations, the PUC thereby failed and neglected to obey FCC Order 81-312, which required the application of the federal Separations Manual." Pet. App. 44a. The district court permanently enjoined the PUC from failing to follow the Ozark Plan and ordered it to make effective intrastate rates sufficient to generate additional revenues of $10.5 million annually (*id.* at 177a).

b. The court of appeals affirmed (Pet. App. 1a-36a). It first concluded that FCC Order 81-312, which provides that the Ozark Separations Manual "SHALL APPLY to Hawaii and Alaska" (Pet. App. 250a), is an "order" within the meaning of Section 401(b). It noted that the First Circuit had concluded in *New England Tel. & Tel. Co.* v. *Public Util. Comm'n of Maine*, 742 F.2d 1 (1984), cert. denied, 476 U.S. 1174 (1986), that, in general, rulemaking orders are not "order[s]" under Section 401(b), and that Order 81-312 resulted from a rulemaking proceeding (Pet. App. 14a). The court concluded that it "need not decide today whether every rule, order, or regulation promulgated by the FCC is an enforceable order under § 401(b)" because "[t]he language of the particular order in question, and the proceedings leading up to it, demonstrate that the FCC intended Order 81-312 to require particular actions be taken by the PUC and private carriers providing service to Hawaii" (*id.* at 17a). Indeed, it noted that the "PUC conceded that it must abide by those FCC-mandated separations procedures" (*id.* at 17a-18a). "Under the circumstances," the court concluded, "FCC Order 81-312 was appropriately interpreted as an 'order' for enforcement by injunction in the district court" (*id.* at 18a).

With respect to the claim that the Hawaiian Telephone Company was barred from arguing that the PUC had failed to follow the FCC's order applying the Ozark Plan to Hawaii because that argument had been rejected in the first proceeding, the court of appeals noted that when the Hawaii PUC's first decision was made the Hawaiian Telephone Company "was operating under its transition agreement with AT&T * * * [which] provided for

payments to [the Hawaiian Telephone Company] to soften the impact on its overall revenues of the mandated use of the Ozark Plan" (Pet. App. 21a-22a). "In contrast," the court noted, the second order involved a "new setting" because it affected "rates effective January 1, 1985, after the transition agreement had expired" (*id.* at 22a). Thus, while the PUC's first decision affected rates during the period in which the Hawaiian Telephone Company received transitional supplement payments from AT&T, the second decision (although based on test year 1983, during which the Company received transitional supplement payments) would only affect the rates charged after the payments had ceased. Relying on *Commissioner* v. *Sunnen*, 333 U.S. 591, 597-598 (1948), the court concluded that the Hawaiian Telephone Company was not barred from raising the issue in the second proceeding because the cessation of the transitional supplement payments constituted a significant difference between the proceedings (Pet. App. 21a).[10]

On the merits, petitioners "concede[d] the FCC's plenary authority over separations procedures" (Pet. App. 23a). They instead argued that the FCC "had not exercised" its power to control the Hawaii PUC's ratemaking proceedings with respect to separations matters (*id.* at 22a-23a). The court of appeals rejected that contention. It noted that Section 410(c) of the Communications Act grants the FCC authority to decide separations matters (*id.* at 24a). It then observed that "separations for interstate ratemaking and separations for intrastate ratemaking are two sides of the same coin" (*id.* at 23a), so that "FCC Order 81-312 necessarily preempted any independent separations procedures of the Hawaii PUC" (*id.* at 25a). The court noted that this Court's decision in *Louisiana Pub. Serv. Comm'n*, which concerned intrastate ratemaking *after* the FCC separates interstate and intrastate expenses (476 U.S. at 375), "supports our conclusion that the FCC separations procedures authorized by § 410(c) of the Act bind the states" (Pet. App. 27a).

The court of appeals next agreed with the district court that "the 'appropriate adjustment' here was a fairly transparent and improper attempt to circumvent the FCC mandate" (Pet. App.

[10] The court of appeals rejected the Hawaii PUC's contention that the Johnson Act bars the injunction for essentially the same reasons given by the district court (Pet. App. 19a-20a).

27a). It concluded: "The PUC clearly has supreme authority with regard to intrastate ratemaking; but the PUC is not entitled to define boundaries of its intrastate sphere that are different from those established by the valid FCC order. Nor can the PUC accomplish by subterfuge what it could not, by its own admission, do directly." Pet. App. 29a.[11]

DISCUSSION

1. Petitioners first argue (Pet. 18-19) that review is warranted because the decision below conflicts with the First Circuit's decision in *New England Tel. & Tel. Co.*, where the court concluded that Section 401(b) generally authorizes suits to enforce orders resulting from FCC adjudicatory proceedings, but not orders resulting from rulemaking proceedings. As an initial matter, for reasons stated more fully in our brief in *Public Serv. Comm'n of Maryland* v. *Chesapeake & Potomac Tel. Co.*, No. 84-1362, we, like the court below, are not persuaded by the First Circuit's conclusion that Section 401(b), which does not on its face distinguish between different types of orders, may generally be used only to enforce FCC orders resulting from adjudicatory proceedings.[12]

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[11] Judge Ferguson dissented. He first stated that while "[i]t is undisputed that the Communications Act empowers the FCC to prescribe uniform separations procedures for apportioning the property and expenses of telephone companies between the interstate jurisdiction, governed by the FCC, and the intrastate jurisdiction, governed by state regulatory authorities" (Pet. App. 30a), "error arises if it is concluded that this grant of authority extends to intrastate rate-making" (*id.* at 33a). However, he concluded that it was not necessary to reach that issue because, in his view, the Hawaiian Telephone Company was collaterally estopped by the prior Hawaii Supreme Court decision from arguing that the Hawaii PUC's "appropriate adjustment" was simply a device to avoid the FCC's separations order (*id.* at 35a-36a).

[12] We are serving a copy of our brief in *Public Serv. Comm'n of Maryland* on the parties here. The Court heard oral argument in that case, which presented the question whether an FCC rulemaking order that preempted the states from using depreciation methods contrary to those prescribed by the FCC could be enforced under Section 401(b). The Court did not decide that question, but instead remanded in light of the decision in *Louisiana Pub. Serv. Comm'n*, which held that the FCC lacks authority to prescribe preemptive depreciation procedures and hence resolved the underlying dispute in *Public Serv. Comm'n of Maryland*, 476 U.S. 445 (1986).

We do not believe that review is warranted here to resolve the alleged conflict in the courts of appeals. While the court below indicated its disagreement with the First Circuit's approach (Pet. App. 15a-17a), it is not at all clear that the two courts would reach different results on the facts of this case. In *New England Tel. & Tel. Co.*, the First Circuit held that an order issued as part of a rulemaking proceeding could not be enforced in an action brought under Section 401(b) against the Public Utilities Commission of Maine, which was not a party to the rulemaking proceeding. The court read "order" in Section 401(b) "to apply exclusively to those cases in which the [Federal Communications] Commission has previously considered and determined the specific rights and duties in question and where the private action seeks only to enforce the Commission's specific mandate" (742 F.2d at 5). Noting that "[r]ules are general in form and they can be highly general in content" (*id.* at 6), the court thought it unfair to enforce rules "against persons not parties to the rulemaking proceeding" (*id.* at 7). It suggested (without deciding) that suit might be brought pursuant to Section 401(b) to enforce the rulemaking order in that case against the Ohio Public Utilities Commission because the Ohio Commission had participated in that proceeding in response to a complaint directed against it and had been ordered explicitly to conform to the FCC's depreciation orders (*id.* at 9).

The concerns expressed by the First Circuit are not present here. The relevant FCC proceeding involved only questions relating to the integration of Hawaii and Alaska into the nationwide telephone rate structure and FCC Order 81-312 concisely provided that the Ozark Separations manual "SHALL APPLY to Hawaii and Alaska" (Pet. App. 250a). The Chairman of the Hawaii PUC served on the joint board that recommended that result and the Hawaii PUC participated in the FCC's consideration of the joint board's recommendation. Moreover, the PUC has consistently maintained that it agrees that the FCC's order requires it to apply Ozark Plan separations in state ratemaking proceedings (see pages 13-14, *infra*). In these circumstances, it does not seem unfair to require the Hawaii PUC to comply with the order the Hawaiian Telephone Company seeks to enforce.

Accordingly, it is not clear that the First Circuit would conclude that the order in question cannot be enforced against the Hawaii PUC pursuant to Section 401(b). It might conclude, with respect to FCC Order 81-312, that the Hawaii PUC is more comparable to the Ohio Public Utilities Commission than to the Public Utilities Commission of Maine, so that the order is enforceable.

Conversely, the court below made clear that it was "not decid[ing] today whether every rule, order, or regulation promulgated by the FCC is an enforceable order under § 401(b)" (Pet. App. 17a). Accordingly, in a case involving a very general rule where the defendant was not involved in the rulemaking proceedings, that court might conclude that the rule could not be enforced in a Section 401(b) proceeding. While the First Circuit and the Ninth Circuit might reach differing conclusions on the facts of *New England Tel. & Tel. Co.*, and while a number of other courts of appeals have reached conclusions contrary to those of the First Circuit (see cases cited at Pet. App. 15a n.19) and no court of appeals has followed the First Circuit's approach, this case is not an appropriate one for resolving the disagreements that have arisen.[13]

2. Petitioners next argue (Pet. 19-23) that 47 U.S.C. (& Supp. III) 152(b), as construed in *Louisiana Pub. Serv. Comm'n,* grants state regulatory commissions broad authority over intrastate rates and that the courts below improperly intruded into that realm here. We think that whether the courts below correctly concluded that the Hawaii PUC improperly refused to apply the Ozark Plan and properly ordered the PUC to increase the Hawaiian Telephone Company's intrastate rates by $10.5 million are close questions. However, the answers to

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[13] Petitioners suggest (Pet. 19 n.8) that the courts below erred in concluding that the issuance of an injunction was not prohibited by the Johnson Act. However, as we explained in our brief (at 17 n.14) in *Public Util. Comm'n of Maryland*, we agree with the courts below (Pet. App. 19a-20a, 45a) that where jurisdiction is based on a federal statute such as Section 401(b), the Johnson Act, which applies where "[j]urisdiction is based solely on diversity of citizenship or repugnance of the order to the Federal Constitution," is not a bar to the issuance of an injunction.

those questions depend on how the complicated factual issues presented by this unique case are resolved rather than on how any legal issue is resolved. Accordingly, review by this Court is not warranted.

a. There is very little dispute with respect to any legal issue. On the one hand, it is undisputed that the states set rates for intrastate telephone service. On the other hand, it is clear that the FCC separates and allocates telephone equipment to the interstate and intrastate spheres, and that its decisions with respect to separations matters control. Section 410(c), added to the Communications Act in 1971, makes that plain. It provides that the FCC "shall refer any proceeding regarding the jurisdictional separation of common carrier property and expenses between interstate and intrastate operations * * * to a Federal-State Joint Board." It further provides that the FCC "shall also afford the State members of the Joint Board an opportunity to participate in its deliberations, *but not vote,* when it has under consideration the recommended decision of the Joint Board" (§ 410(c) (emphasis added)). Thus, under the scheme Congress established, the states participate in separations proceedings, but the FCC makes the final decision. Congress described the joint board procedure established in Section 410(c) as achieving "joint participation without abandoning Federal superintendence in the field." S. Rep. 92-362, 92d Cong., 1st Sess. 6 (1971).

The Hawaii PUC has recognized throughout the proceedings underlying this case that the FCC's separations orders control cost allocations in the state ratemaking proceedings. In its order with respect to the Hawaiian Telephone Company's first rate increase request, the PUC stated that "the Ozark Plan was made applicable to Hawaii by order of the Federal Communications Commission" (Pet. App. 139a). In its second order, the PUC stated that "this Commission did not adopt the Hawaiian Plan II in [the Hawaiian Telephone Company's] last rate case and the Commission recognized the Ozark Separation Plan as being appropriate in allocating expenses and capital expenditures between [the Hawaiian Telephone Company's] intrastate and interstate operations" (*id.* at 106a-107a). It reiterated on reconsideration that it was "not substituting the Hawaiian Plan II for

the Ozark Plan for ratemaking purposes" (*id.* at 52a-53a (emphasis omitted)). Thus, the Hawaii PUC agrees that the FCC's 1981 separations order is binding in its ratemaking proceedings. In the court of appeals, it "concede[d] the FCC's plenary authority over separations procedures" (*id.* at 23a).

Nothing in *Louisiana Pub. Serv. Comm'n* calls into question the Hawaii PUC's concession that the FCC's separations decision controls jurisdictional cost allocation in intrastate ratemaking proceedings. In that case, the "principal argument" that the FCC had authority to require state commissions to follow its depreciation rules was based on 47 U.S.C. 220, which deals specifically with depreciation (476 U.S. at 366). The Court concluded that Section 220 either merely "spell[s] out the authority of the FCC in the context of interstate regulation" (476 U.S. at 377) or "dictate[s] how the carriers' books would be kept for the purposes of financial reporting" (*id.* at 378), but does not give the FCC authority over depreciation practices used in intrastate ratemaking. The Court also concluded that 47 U.S.C. (& Supp. III) 152(b), which provides that the states have authority over "charges, classifications, practices, services, facilities, [and] regulations [used] for or in connection with intrastate communication service," expressly grants the states authority over depreciation practices, since " '[c]harges, 'classifications,' and 'practices,' are terms often used by accountants, regulators, courts, and commentators to denote depreciation treatment" (476 U.S 371). Here, in contrast, it is clear under Section 410(c) that the FCC has authority to determine separations for intrastate ratemaking purposes and Section 152(b) does not give the states authority to separate and allocate the costs of telephone equipment to the intrastate and interstate jurisdictions.[14]

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[14] Petitioners thus err (Pet. 22-23) in relying on the dissenting judge's view (Pet. App. 33a) that the Hawaiian Telephone Company's argument "is essentially the same kind of argument that the Court rejected in *Louisiana.*" Had the Court concluded in that case that Section 220 gives the FCC authority to prescribe depreciation methods for use in intrastate as well as interstate ratemaking proceedings and that Section 152(b) does not give the states authority to determine depreciation matters, it would have ruled differently. Here, in contrast to *Louisiana Pub. Serv. Comm'n*, it is undisputed that the authority granted the FCC over separations in Section 410(c), unlike its power

The Court noted in *Louisiana Pub. Serv. Comm'n* that federal and state regulators exercise their authority over rates in their respective jurisdictions "once the correct allocation between interstate and intrastate use has been made" (476 U.S. at 375). That is perfectly consistent with the conclusion that state regulators must respect the separations decisions made by the FCC in setting intrastate rates. In any event, in light of the position taken by the Hawaii PUC throughout the course of this litigation, this case presents no occasion to consider whether state regulators must follow the FCC's separations decisions.

b. The dispute here is primarily a factual dispute. The Hawaii PUC made what it termed an "appropriate adjustment" of the Hawaiian Telephone Company's rate of return on account of the company's receipt of transitional supplement payments from AT&T (Pet. App. 101a). However, while consistently maintaining that it was applying Ozark Plan separations procedures, the PUC calculated the adjustment by substituting the result that would obtain from application of the Hawaiian Plan II separations formula for the result under the Ozark Plan. In light of the PUC's choice of that method to implement the adjustment, the district court concluded that the PUC had not made an appropriate adjustment, but was simply refusing to apply Ozark Plan separations (*id.* at 44a). The court of appeals agreed, adding that the PUC cannot "accomplish by subterfuge what it could not, by its own admission, do directly" (*id.* at 29a).

It is not indisputably clear whether, in fact, the Hawaii PUC made an "appropriate adjustment" (Pet. App. 101a) or "a thinly veiled attempt to depart from the required separation of plant and expenses between interstate and intrastate use" (*id.* at 29a). On the one hand, an adjustment of the intrastate rate of return

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over depreciation under Section 220, extends to intrastate ratemaking. And, while it is clear that Section 152(b) grants the states authority over intrastate ratemaking (see 476 U.S. at 372-373), it has not been contended that it authorizes the states to establish their own separations procedures.

in light of the Hawaiian Telephone Company's receipt of transitional supplement payments would appear to be appropriate in light of its representations that the payments would limit its need to raise intrastate rates, even though the transitional supplement payments were interstate revenues.[15] On the other hand, the adjustment the PUC made, as the district court stressed, was not calculated with respect to the transitional supplement payments, but was instead "the product of applying Hawaiian Plan II for purposes of separations" (*id.* at 44a).

It is not appropriate for this Court to grant the petition to resolve this factual dispute. This is especially so since the proper resolution of this case depends on the treatment of the transitional supplement payments, which were paid from 1981 through 1984 and have ceased. Moreover, arrangements similar to AT&T's agreement to make transitional supplement payments are unlikely to be made in the future because interstate settlements have largely been replaced by access charges (see note 2, *supra*). Thus, the dispute here appears to be largely of historical interest.

c. Petitioners advance one argument with respect to the merits of the district court's order that may be of future relevance. They contend (Pet. 29-30) that the district court erred in ordering the Hawaii PUC to set rates sufficient to generate additional revenues of $10.5 million annually (Pet. App. 177a). In petitioners' view, once the court found that the PUC had failed to comply with the FCC's order, it should have enjoined the PUC without mandating a specific increase in the amount of the Hawaiian Telephone Company's intrastate revenues.

In our view, the specificity of the district court's order is troublesome. Section 152(b) clearly gives the states authority over the setting of intrastate rates. Thus, on the assumption that the district court was right in enjoining the Hawaii PUC from

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[15] Indeed, the Hawaiian Telephone Company stated in the first rate increase proceeding that it had reduced its request in light of the transitional supplement payments, thus apparently agreeing that an adjustment was appropriate (Pet. App. 155a (dissenting opinion)). Whether the Company in fact reduced its request as it claimed was never directly addressed by the Hawaii PUC.

failing to follow the Ozark Plan, the proper remedy would seem to be to instruct the PUC to calculate the Hawaiian Telephone Company's revenue requirement without regard to the difference between application of Ozark Separations and Hawaiian Plan II.[16] However, since the PUC found that the effect of using the Ozark Plan rather than Hawaiian Plan II would be to increase the Hawaiian Telephone Company's revenues by $10.5 million, and that its "appropriate adjustment" would reduce the company's revenues by that amount (Pet. App. 55a), it appears that there is no dispute that the result of the application of the Ozark Plan formula would be a $10.5 million increase in the Hawaiian Telephone Company's intrastate rates. Petitioners do not suggest that application of the Ozark Plan would lead to any other result. In that circumstance (in which the alleged error in the form of the order may be wholly immaterial), and since petitioners did not focus on the argument that the district court's remedy is improper in the courts below (which, accordingly, did not address the issue), there is no reason for this Court to consider whether the district court erred in specifying a $10.5 million increase in intrastate rates.

3. Petitioners also contend (Pet. 23-25) that, because of the Hawaii Supreme Court's decision affirming the Hawaii PUC's first rate order, the courts below were barred by res judicata or collateral estoppel from determining whether the PUC's similar adjustment in the second rate order was appropriate. It seems plainly correct that the change in circumstances cited by the

[16] We see no reason, under the peculiar facts of this case, why the Hawaii PUC, after applying the Ozark Plan formula, could not then take into account the amount of the transitional supplement payment the Hawaiian Telephone Company would receive in setting its intrastate revenue requirement, which is what the Hawaii Consumer Advocate asked it to do and it declined to do (Pet. App. 132a). Indeed, as noted (see page 5 & note 15, *supra*), the Hawaiian Telephone Company has acknowledged that such an adjustment would be appropriate here, although it contends that it decreased its requested revenue requirement so that no further adjustment would be appropriate. Since the transitional supplement payments have ceased, however, whether the Hawaii PUC could adjust the Hawaiian Telephone Company's revenue requirement in light of those payments is not an issue of prospective importance.

court of appeals—the cessation of the transitional supplement payments—warranted a new consideration of the matter. In its second decision, the Hawaii PUC did not suggest that the cessation of transitional supplement payments was not a reason to reconsider the appropriateness of its adjustment. It instead stated that since the second rate request was based on test year 1983, and transitional supplement payments were made in that year, it would consider the effect of the payments even though it knew the payments would cease by the time its order took effect (Pet. App. 102a-103a). It seems clear that the Hawaii PUC would have reconsidered the appropriateness of the adjustment had the test year been 1985.[17] In any event, whether the change in circumstances here was sufficient so that the Hawaiian Telephone Company was not precluded from challenging the appropriateness of the adjustment of its rate of return is a fact-bound question not warranting review by this Court.[18]

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[17] Indeed, petitioners appear to acknowledge that the PUC's only basis for the adjustment was the receipt of the transitional supplement payments, but they suggest that the Hawaiian Telephone Company's proper recourse is to apply for another rate increase based on test year 1985 (Pet. 28-29).

[18] Petitioners also contend (Pet. 24) that the Hawaiian Telephone Company's appeal of the second rate decision to the Hawaii Supreme Court, which the Company dismissed following the PUC's decision on reconsideration, barred its subsequent Section 401(b) action. The court of appeals did not consider whether the filing of an appeal from a state ratemaking order precludes a Section 401(b) action, an argument that petitioners did not press below. Moreover, the basis for petitioner's argument is its unsupported contention that under the Hawaii Rules of Civil Procedure a voluntary dismissal of an appeal is a dismissal with prejudice. In those circumstances, review by this Court is not warranted.

Similarly, petitioners raise various arguments relating to abstention (Pet. 25-28) that were not raised below until after the court of appeals had issued its decision (and hence were not addressed by the court of appeals). These belated contentions appear to depend on petitioners' assertion that the Hawaiian Telephone Company's Section 401(b) suit is barred by res judicata. Furthermore, there is little basis for contending that abstention is appropriate where a federal statute (§ 401(b)) specifically provides jurisdiction to determine whether a state agency is following federal law and there are no ongoing state proceedings. Accordingly, review of the abstention issues is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 87-1152

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

PUBLIC UTILITIES COMMISSION OF THE STATE OF HAWAII; ALBERT TOM, *Chairman;* SUNAO KIDO, *Commissioner; and* RUSSEL S. NAGATA, *Director of the Department of Commerce and Consumer Affairs, State of Hawaii, and Consumer Advocate,*

Petitioners,

v.

HAWAIIAN TELEPHONE COMPANY, *a Hawaii Corporation,*

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITIONERS' SUPPLEMENTAL BRIEF

This brief is filed under S. Ct. Rule 22.6 in response to the Brief for the United States ("U.S. Br.") filed June 6, 1988.

ARGUMENT

Although the Government concedes that this Court has once granted review but has yet to resolve the important, recurring, and unsettled issue whether 47 U.S.C. § 401(b) permits private enforcement actions of non-adjudicatory

FCC orders against state rate commissions (U.S. Br. at 10),[1] that the Hawaii PUC would not have been preempted from addressing HawTel's statements by ordering rate of return reductions much higher than the 1.1 percent here (*id.* 17 n.4), and that the injunction here is both "troublesome[ly]" specific (*id.* 18) and wholly unneeded because the PUC might have granted rates sought in an "increase [docket] based on test year 1985" (*id.* 19 n.17), the Government counsels denial of review because the First Circuit, despite its rulings, "might" find § 401(b) apt (id. 12), whether the rate orders here are preempted turns on a "factual dispute" (*id.* 16), the legal—indeed jurisdictional—effect of state court rulings (which conflict with the decision below) by which HawTel lost, and then forfeited, the claims on which federal judicial relief issued, is a "factbound question" (*id.* 18), abstention is inapt because "there are no ongoing state proceedings" (*id.* n.18), and petitioners' ripeness and remedial issues are only about "the form of the order" (*id.* 17).

Not only are all the Government's reasons for denying review totally wrong, the Government proves why the decision below, allowed to stand, will leave gaping holes in the statutes and doctrines that bar incursions by the federal district courts into state ratemaking.

A. The Government Offers No Good Reasons Why This Court Should Not Decide the Reach of 47 U.S.C. § 401(b).

The Government concedes that the decision below to assume jurisdiction under 47 U.S.C. § 401(b) conflicts "with the First Circuit's approach" (U.S. Br. 11 (citing *New England Tel. & Tel. Co. v. PUC*, 742 F.2d 1 (1st Cir. 1984), *cert. denied*, 476 U.S. 1174 (1986)). While this itself counsels review,[2] the Government's reason why the § 401(b)

[1] (citing *Public Serv. Comm'n of Maryland v. Chesapeake & Potomac Tel.*, No. 84-1362, *cert. granted*, 472 U.S. 1026 (1985), *vacated and remanded on other jurisdictional grounds*, 476 U.S. 445 (1986)).

[2] *See, e.g., Schiavone v. Fortune*, 477 U.S. 21, 22 (1986); *Webb v.*

issues should not be decided—that "it is not at all clear that the two courts would reach different results on the facts of this case" (U.S. Br. 11)—is wrong on its own terms. Focusing on a PUC commissioner's service on the Joint Board that recommended Order 81-312, the Government relies on the First Circuit's dicta that if a state PUC had been named in an adjudicatory action, and a § 401(b) action were commenced against the PUC on the resulting adjudicatory order, then § 401(b) might apply. This dicta is inapt. The Government does not and could not argue the Joint Board in recommending, or the FCC in adopting, Order 81-312, acted in other than a rulemaking capacity. Section 410(c), 47 U.S.C. § 410(c), is clear that such Joint Board proceedings are solely "pursuant to a notice of proposed rulemaking," and there is no claim that Order 81-312 was issued by trial-type process. There is a conflict here.

Efforts to diminish the conflict are also belied by claims that the court below would act differently given a "general rule" (U.S. Br. 12). Here, as is admitted, the FCC did no more than "concisely" state "that the Ozark Separations manual 'SHALL APPLY to Hawaii' " (*id.* 11). Order 81-312 did not address the issue here: whether and how far the PUC could reduce HawTel's rate of return on the basis of HawTel's own past statements. The Government could not be more wrong in arguing that the First Circuit's concerns over private enforcement where the FCC has not " 'previously considered and determined the specific rights and duties in question' . . . are not present here" (*id.*). HawTel's misleading acts were not apparent until months after FCC Order 81-312 was issued on June 29, 1981 (A249), namely, when on August 23, 1981, HawTel filed its shocking request for $47.6 million in new intrastate revenues (A123).

Moreover, efforts to distinguish *New England Telephone* produce uncertainty (which an APA-based approach avoids)

Dyer County, 471 U.S. 234, 239 (1985); *Stencel Aero Eng'g Corp. v. United States*, 431 U.S. 666, 669 n.6 (1977).

to be eschewed in jurisdictional analysis. The view that jurisdiction under § 401(b) can be asserted if "it does not seem unfair" (U.S. Br. 11), reflects a view of "equitable" subject matter jurisdiction that obtains nowhere else. *See Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365, 377 n.21 (1978).[3]

This Court has already decided that an apparent conflict with *New England Telephone* merits review. The issues it heard in No. 84-1362 (U.S. Br. 10), but did not decide, are as follows:

> (1) Does § 401(b) of Communications Act embrace orders issued by Federal Communications Commission in course of rulemaking proceedings, as FCC has urged and court below has held, or is section limited to FCC orders issued in adjudicatory proceedings, as U.S. Court of Appeals for the First Circuit has held? (2) Is state utility regulatory commission "person" within meaning of § 401(b) . . .?

No. 84-1362, 56 U.S.L.W. 3693 (U.S. Feb. 2, 1985). Question 1 of our petition squarely presents these identical issues. In recognition of its past order, the Court should grant review.

B. The Notion that Preemption May Be Based Upon the Remedy a State Imposes Within its Sphere of Regulation Defies Not only 47 U.S.C. § 152(b) but the Precepts of the Johnson Act.

The Government's concession that "an adjustment of the intrastate rate of return in light of the Hawaiian Telephone Company's receipt of transitional supplement payments would appear to be appropriate in light of its representations that the payment would limit its need to raise intrastate rates," (U.S. Br. 15-16), counsels summary reversal. Instead, the Government argues against even re-

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[3] Indeed, the Government is loathe to suffer itself to be haled into court on such a "ticket good on this day and train only." *See* Pet. Br. at 43, *United States v. Hohri*, No. 86-510.

view because "[i]t is not indisputably clear whether in fact the Hawaii PUC made '[such an adjustment]' " (*id.*). Because, the Government urges, since the *effects* of the PUC remedy coincide roughly with those of abandoning the FCC rules, it might be thought Hawaii "attempted" to " 'depart from [the federal formulas]' " (*id.*), and hence the issue here is a "factual dispute" undeserving of review (*id.*).

The Government is wrong. This is not an Establishment Clause or race discrimination case, where the animus underlying state action is properly the focus, and evidence of a mixed motive may require invalidation. *See Wallace v. Jaffree*, 472 U.S. 38, 56 (1985); *Hunter v. Underwood*, 471 U.S. 222, 232 (1985); *but cf. Lynch v. Donnelly*, 465 U.S. 668, 681 n.6 (1984); *Washington v. Davis*, 426 U.S. 229, 253 (1976) (Stevens, J.).

This is a preemption case in which, if the state is in its sphere, federal courts "literally ha[ve] no power to act." *Louisiana PSC v. FCC*, 476 U.S. 355, 374 (1986). As in *Pacific Gas & Electric Co. v. Energy Resources Comm'n*, 461 U.S. 190 (1983), the courts below should not have "become embroiled in attempting to ascertain [the PUC's] true motive." *Id.* at 216. The issue is not the State's intent, but whether there is "an actual conflict between state and federal law." 461 U.S. at 216 n.28. Nowhere does the Government argue such a "conflict," as the Court has defined it, exists. *E.g.*, *California Coastal Comm'n v. Granite Rock Co.*, 107 S. Ct. 1419, 1425 (1987).

The Government gains nothing from a claim that the "subregime" for separations "preempts the field" (U.S. Br. 14-15). Even on such a view, it remains whether the PUC order "regulates *within* this exclusively federal domain." *Schneidewind v. ANR Pipeline Co.*, 108 S. Ct. 1145, 1153 (U.S. 1988). Not unless "[e]ach" purpose of the order "is an attempt to regulate matters within [the FCC's supposedly] exclusive jurisdiction," *id.* at 1155, is this so. When, as here, the PUC has "authoritatively construed," *id.* at 1154, its purpose as holding HawTel to its own demands, and not as departing from FCC formulas, and

that construction is not irrational, a court may not hold otherwise even if the PUC's motive is "not indisputably clear" (U.S. Br. 15). It is Congress's intent that counts, and, given the Government's own view that HawTel would have no preemption claim if the PUC denied, say, three times the revenues here (*id.* 17 n.16), it would be odd if the " ' " 'clear and manifest purpose of Congress,' " ' " *Puerto Rico Department of Consumer Affairs v. ISLA Petroleum Corp.*, 108 S. Ct. 1350, 1353 (1988), was to prevent the PUC from imposing the lesser remedy it chose.

Thus, the fight here is not "a factual dispute" of "historical interest" (U.S. Br. 15-16) but involves millions in intrastate charges wrongly exacted from ratepayers,[4] and the most basic issues of federalism.[5] Permitted to stand, the panel's preemption analysis, which permits state orders to be nullified on a "factual" inference of "anti-federal" intent, will have radical effects supported nowhere in present law.[6] In short, nothing the Government argues answers the claim that the panel evaded the Johnson Act, and accepted "essentially the same kind of argument that th[is] Court rejected in *Louisiana*" (A33). The PUC was engaged in intrastate ratemaking, and the inferior federal courts here "literally ha[d] no power to act."

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[4] That petitioners would, upon the relief prayed here, seek return of the charges wrongly ordered by the Ninth Circuit is consistent with our ripeness argument. *See Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 183, 200 (1985) (reversing $350,000 jury verdict and remanding).

[5] The Government at most wrongly uses " 'the vexing nature' " of the distinction of law from fact to "diminish its importance, or the importance of the principles that require [it] to be drawn." *Bose v. Consumers Union*, 466 U.S. 485, 501 (1984).

[6] As stated (Pet. 21-22; Reply 2-4), given the tensions in "dual federal and state regulation," the panel allows any rate of return adjustment to be recast as a breach of FCC separation rules that may be nullified in the federal courts. Nothing, of course, confines the panel analysis to the Communications Act.

C. The Grounds for Review Based Upon Precepts of Comity, Abstention and Justiciability Remain Compelling.

1. The Government like the lower court ignores that effects of state judicial orders in Dockets 4306 and 4588 are state law matters. 28 U.S.C. 1738. Our full faith and credit claims do not present "fact-bound" issues (U.S. Br. 18). This Court need not decide how Hawaii courts would apply the changed facts rule to the order in Docket 4306 (test year 1982), or whether Hawaii Rule of Appellate Procedure 42 (*cf.* U.S. Br. 18 n.18) bars HawTel's attempt to litigate claims it forfeited in appeal No. 10169 (test year 1983), which our state court dismissed. As is done routinely, all this Court need do here is vacate and remand for application of Hawaii law, preferably with instructions to certify questions to the Hawaii Supreme Court (Pet. 24; Reply 5-6). Given the issues that might be avoided, this course, if not certification by this Court, is warranted.

2. The state court's orders are of even greater import given the jurisdictional rule of *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 482, 484 n.18 (1983).[7] Whatever HawTel's motive was for forfeiting review of *HawTel I*, (U.S. Br. 18), as the dissenting judge below noted, the federal claim in that case is identical to that here. A36; *see id.* A184, A187 (claim that recouping transition payment breaches FCC rules). *Feldman* doubly applies since HawTel forfeited review of Docket 4588—the order at issue—by abandoning appeal No. 10169. To deny review would turn the Johnson Act on its head, allowing collateral relief more powerful than the most deserving prisoner obtains. *Lehman v. Lycoming County*, 458 U.S. 502, 512 (1982); *Tollett v. Henderson*, 411 U.S. 258, 266 (1973); *see Deakins v. Monoghan*, 108 S. Ct. 523, 530 (1988).

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[7] The claim that dismissal in No. 10169 after our answers were filed, A211, 213 n.1, was not "press[ed]" (U.S. Br. 18 n.18) is wrong, *see* A199-202; Br. of Appellant, No. 85-1907 (9th Cir. 1985) at 1 (Issue "E"); *id.* at 55, 58 (facts in No. 10169; "Hawaii and federal laws prohibit . . . relitigation of issues that . . . should have been incorporated into the action in another forum"), and, given *Feldman*, irrelevant.

3. Even if transporting HawTel's claim to the "new setting" of 1985 rendered preclusion inapt, it is conceded we "would have reconsidered" if HawTel filed a 1985 test year docket (U.S. Br. 18). Thus, the issue *here* is unripe under *Williamson County v. Hamilton Bank*, 473 U.S. 172 (1985), and its progeny, and the judgment is error under abstention rules. *See Pennzoil Co. v. Texaco, Inc.*, 107 S. Ct. 1519, 1526 n.9 (1987). Ripeness is not waivable. *Bender v. Williamsport District*, 475 U.S. 534, 541 (1986). Abstention was also not waivable, or waived. *See* Pet. 25-26; Pet. Reply 7 & n.5.

a. The Government simply ignores ripeness. Our claims here on are *not* about the "form of the order" (U.S. Br. 17), but about whether the lower courts had Article III power to enter *any* order.[8] If HawTel felt it would be harmed in 1985 by maintenance of the rate adjustment, its duty was to assemble the data showing the impact on HawTel's total revenue picture in its 1985 test year submission or seek interim relief, *see* Haw. Rev. Stat. § 269-16(c), A227-28. HawTel's remedy was not to abort state processes when it could not obtain the PUC's advance ruling in a docket whose evidence was not targeted to the "changed circumstances" HawTel complained of. Failure to grant certiorari, given these facts, would create an anomalous second-class Article III jurisprudence for States seeking the same protection the Government has long enjoyed, and this Court has recognized, against piecemeal

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[8] We do attack the "troublesome" injunction here, which bars our action on "the transitional supplement payment" (U.S. Br. 16, 17 n.14). This remedial claim was passed on by the court below in its ruling that the rate reduction "produced *results* inconsistent with the objective of a federal statute," A28 (emphasis added). This allows review. *Adickes v. Kress*, 398 U.S. 144, 147 n.2 (1970). Given Article III and Eleventh Amendment concerns from overbroad orders in private actions, *Dayton Board v. Brinkman*, 433 U.S. 406, 420 (1977); *Lelsz v. Kavanaugh*, 807 F.2d 1243, 1252, *reh. denied*, 815 F.2d 1034 (5th Cir. 1987), review is doubly warranted. *See also City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986). The Government is also wrong in claiming (U.S. Br. 17) that we have no right to be freed of unwarranted limits on our discretion. *Lyng v. Northwest Indian Ass'n*, 108 S. Ct. 1319, 1324 (1988).

review of agency action, *FTC v. Standard Oil Co.*, 449 U.S. 232, 243 (1980), *cited*, 473 U.S. at 192, and reverse principles of ratemaking procedure dating to the *Minnesota Rate Cases*, 230 U.S. 352 (1913). *See id.* 466.

b. Nor is abstention inapt simply because "there are no ongoing state proceedings" (U.S. Br. 18 n.18).[9] The claim on its face is wrong insofar as neither *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), nor *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496 (1941), which were formulated specifically to address federal judicial attacks that undermine comprehensive regulatory schemes, depend upon "ongoing proceedings." *Burford*, 319 U.S. at 327-34; *Pullman*, 312 U.S. at 498-502. Indeed, the "types of abstention are not rigid pigeonholes into which federal courts must try to fit cases," *Pennzoil Co. v. Texaco, Inc.*, 107 S. Ct. 1519, 1526 n.9 (1987). An "ongoing proceeding" requirement ought not be "rigidly" enforced, even on a claim of *Younger* abstention, *see Younger v. Harris*, 401 U.S. 37 (1971), if all other *Younger* requirements are met, tools to invoke state processes are in the hands of a federal litigant, and, as a practical matter, regulation is a continuous process.[10] Even if one wrongly assumes the judgment below did not violate *Burford, Pullman,* and *Younger* in their own right, clearly the Ninth Circuit ignored the "complex of considerations designed to soften the tensions inherent in a system that contemplates parallel judicial processes." *Pennzoil*, 107 S. Ct. at 1526 n.9. This is particularly so when a state court litigant has not just "fail[ed] to assert its state remedies in a timely manner," *id.* at 1529 n.16, but has voluntarily aborted an ongoing state judicial proceeding in order to sandbag the state's regulatory system with massive—and unprecedented—federal judicial relief.

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[9] The premise for this claim is not clear, particularly at the time relief was entered in the district court, *see* PUC Order 8180 (Nov. 23, 1984) (Docket 5114) (test year 1985), Ex "A" to Reply Mem., No. 84-1306 (D. Haw. Dec. 10, 1984).

[10] This is all the more true under the Government's view of the narrow preclusive effect of state ratemaking judgments.

CONCLUSION

For the foregoing reasons and those stated previously, the Court should grant the petition for certiorari.

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